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No. 09-87

Supreme Court, U.S.
FILED
JUL 20 2009
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In The

# Supreme Court of the United States

GINGER MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn,

*Petitioner,*

v.

DeWAYNE BEGGS, as Sheriff of Cleveland County; DAVID EPPS; KEVIN BRANDON; CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS; TOMMY EDWARDS; GILBERT KIRKLAND,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the County can be held liable under 42 U.S.C. § 1983 for a "systemic injury" caused either by the county or the interactive behavior of several government officials, even though no individual government actor is liable.

2. Whether petitioners in a 42 U.S.C. § 1983 action showed a genuine issue of material fact with respect to the deliberate indifference to petitioner's serious medical needs.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISION INVOLVED | 1 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF FACTS | 3 |
| REASONS FOR GRANTING THE PETITION | 14 |
| I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AND RELEVANT DECISIONS OF THIS COURT AS TO WHETHER A COUNTY CAN BE LIABLE FOR VIOLATING AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHERE THERE IS NO UNDERLYING CONSTITUTIONAL VIOLATION BY ANY OF ITS OFFICERS | 14 |
| II. THE COURT ERRED BY FAILING TO FIND GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO THE DELIBERATE INDIFFERENCE TO GINN'S SERIOUS MEDICAL NEEDS | 22 |
| CONCLUSION | 33 |

TABLE OF CONTENTS – Continued

Page

APPENDIX

I. TENTH CIRCUIT COURT OF APPEALS DECISION.....App. 1

II. DISTRICT COURT ORDER GRANTING DEFENDANT'S PETITION FOR SUMMARY JUDGMENT .....App. 22

# TABLE OF AUTHORITIES

Page

CASES

*Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) ..... 18

*Analya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584 (10th Cir. 1999) ..... 19

*Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998) ..... 21, 22

*Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1994) ..... 22, 30

*Brown v. Gray*, 227 F.3d 1278 (10th Cir. 2000) ..... 18

*City of Canton v. Harris*, 489 U.S. 378 (1989) ..... 22, 30

*City of Okla. City v. Tuttle*, 471 U.S. 808 (1985) ..... 22

*Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) ..... 22

*Farmer v. Brennan*, 511 U.S. 825 (1994) ..... 21, 23, 24, 30

*Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985) ..... 15, 24

*Gibson v. County of Washoe, Nev.*, 290 F.3d, 1175 (9th Cir. 2002) ..... *passim*

*Green v. Branson*, 108 F.3d 1296 (10th Cir. 1997) ..... 19

*Lopez v. LeMaster*, 172 F.3d 756 (10th Cir. 1999) ..... 17, 21, 23

*McClelland v. Facteau*, 610 F.2d 1516 (10th Cir. 1979) ..... 19

TABLE OF AUTHORITIES – Continued

Page

*McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984) ..... 19

*Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988) .... 17, 19

*Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir. 1983) ..... 19

*Monell v. Department of Social Services*, 436 U.S. 658 (1978) ..... 15

*Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002) ..... 14, 18

*Owen v. City of Independence*, 445 U.S. 622 (1980) ..... 15

*Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) ..... 24

*Ross v. Neff*, 905 F.2d 1345 (10th Cir. 1990) ..... 17

*Specht v. Jensen*, 832 F.2d 805 (10th Cir. 1988) ..... 19

*Winton v. Bd. of Comm'rs of Tulsa County, Okla.*, 88 F.Supp.2d 1247 (N.D. Okla. 2000) ..... 21

CONSTITUTION

U.S. Const. amend. XIV ..... 2

OKLAHOMA STATUTES

Okla. Stat. Ann. tit. 19, § 513 ..... 17

Okla. Stat. Ann. tit. 19, § 547(A) ..... 17

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES AND RULES

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. § 1983 ..... *passim*

## OPINION BELOW

The Tenth Circuit Court of Appeals filed its opinion for publication in the Federal Reporter. The decision is reported at 563 F.3d 1082 (2009). The District Court Order granting the respondents' Motion for Summary Judgment is contained in the Appendix at 22.

## JURISDICTION

The Tenth Circuit filed its decision on April 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

## STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for any act or omission taken in such officer's judicial

capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## CONSTITUTIONAL PROVISION INVOLVED

### 14TH AMENDMENT TO THE U.S. CONSTITUTION

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The Petitioner brought a 42 U.S.C. § 1983 claim and a state law negligence claim for the failure of the Sheriff and the Deputies in Cleveland County, Oklahoma, to provide medical care to her father, Kenneth Wayne Ginn, who was arrested for public

intoxication. Mr. Ginn died in jail and the petitioner alleges the death was caused by the respondents' deliberate indifference in failing to provide medical care. The respondents were sued in their individual and official capacities. The District Court granted Summary Judgment in favor of the respondents with respect to the § 1983 claim and dismissed the state claim without prejudice. On petitioners appeal to the Tenth Circuit, the Summary Judgment in favor of the respondents was affirmed.

## STATEMENT OF FACTS

*Testimony of Teresa Carlson and Misty Fisher*

On May 2, 2006, Teresa Carlson lived across the street to the East of Kenneth Ginn. She had known Ginn for about seven (7) years and he had been in her home many times over the years. Fisher had known Ginn the same amount of time. (Aplt. App. Vol. II at 254 and 341). Ginn came to Carlson's house around 10:00 a.m. Ginn was sober and seemed to be okay. Ginn sat and talked and visited with Carlson and her daughter, Misty Fisher. Later in the day, between 4:00 and 4:30 p.m., Carlson sent Fisher to town to get some meat and Fisher took Ginn by the local Noble Health Clinic to allow him to fill out some paperwork for an upcoming doctors visit. (*Id.* at 254 and 341). Sometime after 4:30 p.m., Fisher and Ginn returned to the house. Ginn came in and had a large open bottle of Crown Royal. Ginn had been drinking the

whiskey straight out of the bottle. Fisher had taken Ginn to the liquor store and Ginn had bought the bottle around 4:30 p.m. and started drinking the whiskey in the car on the way home. (*Id.* at 254 and 341). Ginn drank the entire fifth of Crown Royal. (*Id.* at 255 and 342). He started getting loud and arguentative, knocking stuff off of tables, and wanting to fight. He seemed to be hallucinating and seeing people trying to get him. (*Id.* at 255 and 343). Carlson saw Ginn fall onto the unfinished portion of the porch and thought Ginn hit his head on a board or post that was sticking up. He appeared to be knocked out for a short time. (*Id.* at 255 and 343).

A few minutes after Ginn fell, the first deputy arrived. Carlson and Fisher told the deputy about Ginn having fallen and that he appeared to be knocked out for a short time. (Aplt. App. Vol. II at 255 and 343). Carlson and Fisher told the deputy Ginn had drunk an entire bottle of whiskey. Carlson and Fisher also told the deputy that Ginn seemed to be hallucinating and seeing people trying to get him. (*Id.* at 255, 256, 343 and 344).

Carlson and Fisher told the deputy they thought Ginn needed to go to the doctor or the deputy should call the paramedics. (Aplt. App. Vol. II at 256 and 343). A short time later the second deputy arrived. (*Id.* at 256 and 344). One of the deputies asked Ginn if he wanted to go to the hospital, but Carlson does not believe Ginn responded. Carlson then told the deputy he should call the paramedics. Carlson was told to "shut up and go inside." (*Id.* at 256). Fisher

told the deputies that Ginn had drunk an entire large bottle of Crown Royal on the way home from town and that he was talking as if he was seeing someone. (*Id.* at 344).

Eventually, the deputies made the decision that Ginn was to be arrested. The two deputies had to manhandle Ginn some to get him handcuffed. After that they had no problem putting Ginn in the car; they picked him up and dragged him to the car. (Aplt. App. Vol. II at 256 and 344). Before they left, Carlson saw Ginn slumped over in the back seat of the car and Carlson was concerned that Ginn had passed out. (*Id.* at 256).

*Testimony of Deputy Kirkland*

Carlson told Kirkland that Ginn had drunk a bottle of whiskey. (Aplt. App. Vol. II at 234-235).

On the way to the detention center Kirkland thought Ginn had passed out. Kirkland never gets concerned when a drunk passes out.

To Kirkland's knowledge, Ginn was not asked any questions at the time he was taken into the detention center and placed in the jail. (Aplt. App. Vol. II at 236). In most cases, Kirkland felt it was common for people who were drunk to pass out. While Kirkland was working at the Cleveland County Sheriff's Office he never considered a drunk to need medical care. He never had any training regarding blood alcohol content levels. (*Id.* at 237). Kirkland

never had any training but he understood .08 is legally intoxicated, so he would say anything especially double that would be dangerous. (*Id.* at 238). In all the courses and training he had received at the Reserve Academy and other monthly courses, nobody ever mentioned the level of blood alcohol that was dangerous. (*Id.* at 239). He had never had any training at Cleveland County Sheriff's office regarding what a dangerous level of alcohol consumption would be. (*Id.* at 240).

Kirkland knows that alcohol in large excessive amounts can be dangerous. (Aplt. App. Vol. II at 239). He has never observed any written policy or procedure or had formal training regarding providing medical care and treatment for a prisoner. (*Id.* at 240).

*Testimony of Deputy Epps*

Epps stated Ginn was very intoxicated, his speech was slurred and he was very unstable on his feet. Ginn could not walk straight without assistance, as he probably would have fallen down. Ginn would respond to questions and directions with either a grunt or a mumbled reply. (Aplt. App. Vol. II at 293-294). Epps stated it would have been futile to try to process Ginn through booking because he was not able to answer questions without more than a grunt or a mumble, and Epps would not be able to understand what Ginn was saying. (*Id.* at 295).

Epps could not attest that any sight checks were conducted of Ginn. He could not say he conducted any. (Aplt. App. Vol. II at 296). Sight checks are to be logged into the computer. Epps is not aware of any sight checks being logged into the computer regarding Ginn. (*Id.* at 297). Ginn was brought into the jail about 6:30 p.m. and was found deceased at approximately 9:30 p.m. Epps is not aware of any record of anybody checking on Ginn during those 3 hours. (*Id.* at 297). Epps and the other jailers were not trained to use breathalyzers. Epps was never informed by anyone that Ginn had consumed a bottle of whiskey. Nobody ever told him at any time that Mr. Ginn might need medical care or treatment. (*Id.* at 298).

Epps is not aware of any written policy or guidance of the jail regarding when to provide medical care treatment to somebody for alcohol abuse. He is not aware of any other written standards regarding providing medical care and treatment. (Aplt. App. Vol. II at 299). The nurse on duty was only there until 5:00 p.m. (*Id.* at 300). The detention manual states that anyone with a .30 blood alcohol level or higher will be refused. The deputy is supposed to refuse book-in until after they take them to the hospital and get their blood alcohol level down enough to where it's below a .30. (*Id.* at 300).

Epps was responsible for conducting a medical screening but he never conducted a medical screening because he did not feel like Ginn was fully capable of cooperating. (Aplt. App Vol. II at 301). Epps never made any attempt to do a medical screening in the

time period from 6:30 to 9:30 in the 3 hour period before Ginn was found dead. Epps did not feel the need to check on Ginn. (*Id.* at 303).

There is no regular training provided to the jailers, just pretty much on the job training from other jailers. (Aplt. App. Vol. II at 304).

*Testimony of Deputy Edwards*

Edwards is not aware of anybody at any time requesting a breathalyzer to determine whether someone needs medical treatment. (Aplt. App. Vol. II at 243). Even for somebody arrested for DUI and given a breathalyzer, Edwards is not aware of any guidance as to when they may or may not need medical care or treatment as a result of a specific alcohol content level. He has not received any such training. (*Id.* at 243-244).

Edwards does recall being told that Ginn had fallen. (Aplt. App. Vol. II at 245). In Edwards' affidavit at the time of Ginn's arrest he stated Ginn was unable to stand. He assumed Ginn was unable to stand because of his intoxication. (*Id.* at 246). Ginn was very intoxicated at the time of his arrest. Edwards felt it was necessary in this case for someone to assist Kirkland in getting Ginn from the patrol car into the jail. (*Id.* at 247).

Edwards never had any kind of training at all regarding the level of alcohol you can consume. He agreed that too much alcohol can be dangerous. (Aplt.

App. Vol. II at 248). Edwards is not aware of any policies or procedures in writing at the CCSO regarding providing medical care and treatment. (*Id.* at 248).

Edwards has no opinion as to what a dangerous blood alcohol content level is and he has never had such training. (Aplt. App. Vol. II at 249-250). Edwards did not feel like it was appropriate or necessary to inform someone at the time of the book-in at the Cleveland County jail that Ginn had consumed a bottle of whiskey. (*Id.* at 252).

*Testimony of Deputy Bullard*

There were no sight checks logged in Mr. Ginn's case. (Aplt. App. Vol. II at 306). Although a medical screening is required, one was never performed on Ginn. (*Id.* at 307). It is very common to get prisoners in for public intoxication. (*Id.* at 308).

*Testimony of Deputy Brandon*

To become a detention deputy Brandon had to take 24 hours of training. Brandon does not specifically recall any training regarding alcohol abuse. There wasn't any breathalyzer training at the detention training. (Aplt. App. Vol. II at 259-261). When Brandon first approached the car, Ginn was in the back seat leaning against the door. Brandon felt that if they attempted to get him out on that side it would be more difficult and would run the risk of him falling

out of the vehicle and risking injury, so they took him out by the feet. (*Id.* at 262-263). They did not have to carry him, but there were times they had to get him back up on his feet, but he was able to walk with assistance. He would stumble and drag his feet. (*Id.* at 265, 266, 272, 273).

Brandon was aware of the policy that you should not accept somebody into the jail if they were a .30 or greater. (*Id.* at 276-277). Brandon was never given any training as to what series of questions to ask of somebody who was arrested for public intoxication. (*Id.* at 278-279).

Brandon felt it was his responsibility on May 2 to do the sight checks of Ginn. Sgt. Epps and Deputy Boozer would also be involved in the sight checks. Brandon is not aware of any documented sight checks. (Aplt. App. Vol. II at 280-282). The Detention Manual said inmates requiring detoxification would be observed a minimum of every 30 minutes until sober. (*Id.* at 284-285). The detention policy required the inmate to be checked at least every 15 minutes if he is booked into the facility under borderline conditions. (*Id.* at 285-286). Brandon agreed that Mr. Ginn was not checked on as required by the detention policy. (*Id.* at 287).

Brandon doesn't know if Ginn could walk on his own, because they assisted him the entire time so he would not endanger himself by running into a wall or a bar. (Aplt. App. Vol. II at 287). In making Brandon's determination as to whether Ginn needed medical

supervision it would have been helpful to know how much Ginn had to drink. (*Id.* at 288).

Once Ginn came into the jail either Sgt. Epps or Brandon had the decision authority and responsibility to determine whether Ginn needed medical care. (Aplt. App. Vol. II at 290). Brandon was never told by anyone that Ginn may have hit his head, that he had fallen, that he had consumed an entire bottle of Crown Royal, that Mr. Ginn appeared to be seeing things, and was not told by anyone that Mr. Ginn appeared to pass out at one time. (*Id.* at 290).

*Testimony of Sheriff Beggs*

He is the Sheriff of Cleveland County, and has held this position since January 1993. He is the policy maker for the Cleveland County Sheriff's Office (CCSO) and Cleveland County Detention Center (CCDC). (Aplt. App. Vol. I at 129). In the CCDC, it is not uncommon for an intoxicated person to be taken directly to receiving before being formally processed into the CCDC. This occurs when an intoxicated person is unable, due to his/her intoxication, to answer routine questions asked during processing. (*Id.* at 130).

It is the policy of the CCDC to not require a person arrested for public intoxication to submit to a breathalyzer or blood test, because under Oklahoma law, evidence of the alcohol concentration of a person's breath or blood is not required to arrest or

charge that person for public intoxication. (Aplt. App. Vol. I at 130-131).

Ginn's arrest for public intoxication on May 2, 2006 was reasonable and in accordance with CCSO policy, and it was reasonable and in accordance with CCSO policy to not require Ginn to take a breathalyzer or blood alcohol test on May 2, 2006. (Aplt. App. Vol. I at 131).

It is the policy of the CCDC that if a person with a serious illness or injury is brought to the CCDC for incarceration, that person will be refused incarceration until or unless a medical doctor provides approval that the person is fit for incarceration. (Aplt. App. Vol. I at 131).

Beggs testified that it was reasonable and in accordance with CCDC policy to accept Ginn for incarceration, without obtaining medical approval prior to incarcerating him, on the charge of public intoxication on May 2, 2006. (Aplt. App. Vol. I at 131). According to Beggs a deputy is not authorized to perform a breathalyzer for somebody who is arrested for public intoxication. (Aplt. App. Vol. II at 314). Beggs understands that the portion in the policy that requires the booking deputy to ask the arresting deputy about the blood alcohol level of the inmate applies only to DUI. (*Id.* at 315).

People are arrested for drinking too much alcohol practically on a daily basis. Beggs did not know if it was every day but it is very common. (Aplt. App. Vol. II at 318). Beggs is absolutely aware that people can

die from drinking too much alcohol. (*Id.* at 318). If Ginn had been arrested for DUI or actual physical control and his blood alcohol level was .32, he would not have been admitted into the facility. (*Id.* at 323). Beggs agreed it is dangerous to drink an entire bottle of whiskey in a couple of hours. (*Id.* at 324).

Beggs agrees that someone with the blood alcohol content greater than .30 is in need of medical supervision. He is not aware of any specific training provided to deputies regarding alcohol toxicity, other than breathalyzer training. (Aplt. App. Vol. II at 328). It is Beggs' responsibility to insure that the deputies receive proper training. (*Id.* at 329).

*Testimony of Dr. Desser*

Ginn died from heart disease compounded by a toxic blood alcohol level and ventricular hypertrophy. Ginn's death was preventable. Ginn should have been taken to a medical facility after he was taken into custody. (Aplt. App. Vol. II at 388).

*Report of Autopsy*

The blood alcohol content of Ginn at the time of the autopsy was .32%. (Aplt. App. Vol. II at 333).

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AND RELEVANT DECISIONS OF THIS COURT AS TO WHETHER A COUNTY CAN BE LIABLE FOR VIOLATING AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHERE THERE IS NO UNDERLYING CONSTITUTIONAL VIOLATION BY ANY OF ITS OFFICERS.

The courts have split on the question of whether a county can be liable for violating someone's constitutional rights when there is no underlying constitutional violation by any of its officers.

The Tenth Circuit Court of Appeals failed to find genuine issues of material fact as to whether the cumulative failure of the deputies and Sheriff Beggs to provide medical care violated Ginn's constitutional rights. The Court of Appeals stated "As we have concluded that the individual county defendants (Kirkland, Edwards, Brandon, and Epps) did not violate Ginn's constitutional rights, Beggs and the county cannot be held liable as a matter of law." App. 20. The court stated that a municipality will not be held liable if there was no underlying constitutional violations by any of its officers. *See, e.g. Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002). App. 19.

On the other hand, this Court has held that a municipality may be liable even if liability cannot be

ascribed to a single individual officer. *Owen v. City of Independence*, 445 U.S. 622, 652 (1980) (a "systemic injury" may "result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.").

The decision in *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978) also allows suit to be brought against local governmental bodies directly when the action alleged to be unconstitutional is a municipal policy or practice. *Monell* imposed no requirement that a municipal official be named as a party respondent in any capacity.

In addition, there are cases in which responsibility for a deprivation of a federally protected right cannot be attributed to the conduct of a single employee, but only to the combined conduct of several employees. "Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985).

Even if the Court finds that no one individual violated Ginn's constitutional rights, this case is an excellent example of a "systemic injury" or a case where the combined acts or omissions of several employees acting under a governmental policy or custom violated Ginn's constitutional rights.

It is the knowing and deliberate policy of Sheriff Beggs to not perform or even allow alcohol testing of a person arrested for public intoxication. There was no training of those deputies on how to handle the extremely intoxicated person. Beggs specifically states that his written policy of not admitting someone with a blood alcohol level over .30 to the jail, does not apply to persons charged with public intoxication.

There was no requirement by Sheriff Beggs for the deputies to determine whether the arrestee for public intoxication had consumed a dangerous amount of alcohol. Although Beggs agreed it is dangerous to drink an entire bottle of whiskey in a couple of hours. (Aplt. App. Vol. II at 324).

Persons were arrested almost on a daily basis for public intoxication. Despite the known danger from drinking too much alcohol, there is no evidence that the deputies received training on how to recognize or deal with this serious condition. Based on the policies adopted and implemented by Sheriff Beggs, it was inevitable that an arrestee in the jail would die from drinking too much alcohol. The policy of taking the highly intoxicated arrestee directly to an isolation cell is a danger in itself. Since the arrestee is not inprocessed or given any medical screening the arrestee is exposed to a substantial risk of serious harm when he is left alone in the cell. If the arrestee is unable to answer questions and cooperate in the inprocessing, how would the arrestee be expected to voice his need for medical care or even be capable of articulating or comprehending the seriousness of his condition?

Sheriff Beggs testified that he believed Ginn was properly admitted to the detention facility. As a matter of Oklahoma law, the Sheriff is the final policymaker/decisionmaker regarding all aspects of the operation of the Sheriff's department including the jail such that the failures in his policy will establish a constitutional violation attributable to the County. *See Lopez v. LeMaster*, 172 F.3d 756, 763 (10th Cir. 1999):

> Alternatively, the county may be liable on the basis that [the] Sheriff . . . is a final policymaker with regard to its jail, such that his actions 'may fairly be said to be those of the municipality.' *See Brown*, 520 U.S. at 404. Under Oklahoma law a county sheriff is in charge of the jail and the prisoners therein. *See* Okla. Stat. tit. 19, § 513; tit. 57, § 47 . . .

*Accord Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988) ("Under Oklahoma law, a sheriff is responsible for the proper management of the jail in his county and the conduct of his deputies. Okla. Stat. Ann. tit. 19, §§ 513 & 547(A) (1962 & 1987 cum. supp.) Thus Cleveland County is liable for the customs and policies created by Sheriff Beggs. *Lopez v. LeMaster*, 172 F.3d at 763.

Because Sheriff Beggs has testified that the admission of Ginn to the CCDC was in accordance with his policies, the County is liable for the policies implemented by Beggs. *See Ross v. Neff*, 905 F.2d 1345, 1355 (10th Cir. 1990) (Sheriff said he believed

the arrests were legal; his testimony would permit the jury to find a custom or policy").

In *Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997), the Tenth Circuit held that "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability."

The Tenth Circuit has specifically held that the failure to train jailers as to medical conditions is sufficient to establish an Eighth Amendment violation. *See Brown v. Gray*, 227 F.3d 1278, 2399 (10th Cir. 2000) (to establish a custom of inadequate training "[t]he situation need not be frequent or constant; it must merely be of a type that [the officials] can reasonably expect to confront . . . Circumstances that constitute usual and recurring situations for police *include individuals requiring medical care while in custody*." (emphasis added). *Cf. Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-1320 (10th Cir. 2002) (deliberate indifference in training jailers to deal with OCD even though it occurs in only two percent of the population). Sheriff Beggs' failure to properly train the deputies caused the deputies to neglect Ginn's serious medical needs.

Sheriff Beggs will be deemed to have "personal participation" if he "set in motion a series of acts by others which the actor knows, or reasonably should

know, would cause others to inflict the unconstitutional policy." *Miller v. City of Mission, Kan.*, 705 F.2d 368, 374 (10th Cir. 1983) (quoting from *McClelland v. Facteau*, 610 F.2d 1516, 1524 (10th Cir. 1979)). *Accord Specht v. Jensen*, 832 F.2d 805 (10th Cir. 1988). A "Sheriff [as the] official responsible for the policies and procedures of the . . . Sheriff's Office will be liable . . . for implementing an unconstitutional act." *McKay v. Hammock*, 730 F.2d 1367, 1374 (10th Cir. 1984). This means that by creating an unconstitutional policy of delay or inadequate training, the Sheriff is personally liable for the consequences of that policy. *Cf. Analya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 597 (10th Cir. 1999) (personal liability for person or entity which had a "role in creating the unconstitutional . . . policy"); *Meade, supra*, 841 F.2d at 1528 (personal liability if "supervisor has established or utilized an unconstitutional policy or custom").

"A supervisor is not liable under § 1983 unless an affirmative link exists between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Meade, supra*, 841 F.2d at 1527 (internal quotation marks and alterations omitted). Additionally, "[l]iability of a supervisor under § 1983 must be predicated on the supervisor's deliberate indifference, rather than mere negligence." *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997). Although Sheriff Beggs did not actively participate in the events leading up to Ginn's death, he

could be liable for inadequately supervising and training the deputies.

As the Sheriff of Cleveland County, Sheriff Beggs is ultimately responsible for the operation of the CCDC and the conduct of its employees. Thus, he is responsible for the policy decision that deputies are not even authorized to perform a breathalyzer on one arrested for public intoxication. He is likewise accountable for the fact that the deputies do not undergo any formal training to identify dangerous levels of alcohol intoxication.

The record contains evidence from which a jury could infer that Sheriff Beggs knew that his policies were insufficient to protect a highly intoxicated arrestee from the risk of serious injury. Sheriff Beggs' policy was to take the highly intoxicated arrestee directly to an isolated cell and leave him alone. Although the deputy was supposed to conduct sight checks, these sight checks did not require the deputy to communicate with the arrestee. At least in Ginn's case, Deputy Brandon didn't even confirm Ginn was alive when Brandon allegedly performed a sight check. (Aplt. App. Vol. II at 282).

It is clear that Sheriff Beggs should have better trained and supervised his subordinates, and that he was deliberately indifferent to the risk of serious injury to the highly intoxicated arrestee.

"Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including

inference from circumstantial evidence . . . , and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825 at 842. This knowledge need only be a generalized knowledge of the risk and its potential consequences. *Farmer, id.*, ("an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."). There is no requirement that the respondent know the specifics of the danger as it applies to the petitioner. *See Farmer*, 511 U.S. at 843-44: "Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be" injured or the specific source of the injury. A general awareness of the potential for harm is enough. *Cf. Lopez, supra*, 172 F.3d at 762 and *Winton v. Bd. of Comm'rs of Tulsa County, Okla.*, 88 F.Supp.2d 1247, 1265 (N.D. Okla. 2000) ("The Sheriff is not required to be aware of the particularized risk posed by or to an inmate, or that a particular [injury] is likely.").

The deliberate indifference standard may be satisfied "when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). Although a single incident

generally will not give rise to liability, *City of Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985), "deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." *Barney*, 143 F.3d at 1307 (internal citations omitted). The official position must operate as the "moving force" behind the violation, and the petitioner must demonstrate a "direct causal link" between the action and the right violation. *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 399 (1997). That is, "[w]ould the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *City of Canton*, 480 U.S. at 391. With regard to any attempted showing of "deliberate indifference" by a municipality, the existence of "material issues of material fact preclude[s] summary judgment." *Cruz v. City of Laramie*, 239 F.3d 1183, 1191 (10th Cir. 2001).

## II. THE COURT ERRED BY FAILING TO FIND GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO THE DELIBERATE INDIFFERENCE TO GINN'S SERIOUS MEDICAL NEEDS.

The Petitioner has presented sufficient evidence to create an issue of material fact regarding the respondents' subjective disregard of Ginn's risk of serious injury. Carlson and Fisher both told the arresting deputies, Kirkland and Edwards, that Ginn

needed to go to the doctor or that the paramedics should be called. (Aplt. App. Vol. II at 256 and 343).

Carlson told one of the deputies at her house that Ginn had consumed an entire bottle of whiskey and the he had fallen and appeared to be knocked out for a short time. (*Id.* at 255) According to Fisher, the deputies were informed that Ginn had been knocked out for almost a minute. (*Id.* at 343). Carlson and Fisher also informed the deputies that Ginn seemed to be hallucinating and seeing people trying to get him and that they both thought Ginn needed to go to the doctor. (*Id.* at 255-256). According to Carlson, the deputies asked Ginn if he wanted to go to the hospital, but she doesn't believe Ginn responded. After this, Carlson told the deputies that they should call the paramedics but was told to "shut up and go inside." (*Id.* at 256).

The interactions between Carlson, Fisher, and the deputies revealed clearly obvious indications that Ginn was in need of medical care. Surely, being notified of these events by two witnesses who knew and observed Ginn, that Ginn needed to go to the hospital or that the paramedics should be called, provides ample objective evidence that Ginn needed medical treatment. At the very least, material issues of fact remain concerning whether the deputies were aware of facts from which an inference could be drawn that a substantial risk of medical harm existed and whether they drew that inference. *See Lopez v. LeMaster*, 172 F.3d 756, 764 (10th Cir. 1999). In *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), the

Supreme Court made clear that the respondents' knowledge of a substantial risk of serious harm may be proven by circumstantial evidence, including evidence "that the risk was obvious." (*Id.* at 842). If the testimony of Carlson and Fisher is accepted as true, in a light most favorable to the petitioner, the respondents certainly had knowledge of a substantial risk of serious harm to Ginn.

In *Garcia*, 768 F.2d at 308 the court stated "deliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care." (citing *Ramos v. Lamm*, 639 F.2d, 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)). The court concluded that there was sufficient evidence of deliberate indifference in applying the procedures and in monitoring unconscious and intoxicated persons admitted to the jail. These failures caused a denial of Garcia's constitutional right to receive adequate medical care.

State jail standards and the Cleveland County Detention Center's policies delineate a minimum level of care to be provided, and thus, blatant disregard for them is relevant to showing respondents' deliberate indifference to the Decedent's medical needs. Two examples of the total disregard of the detention policies are: (1) the failure to medically screen Ginn, when he was admitted to the jail and (2) the failure to monitor Ginn after he had been

admitted to the jail. As noted by Deputy Epps in his deposition, there was no medical screening of Ginn as he was taken immediately back to a cell and left alone. (Aplt. App. Vol. II at 301-302). Additionally, there was no record of any monitoring of Ginn during the three hour period from Ginn's admission to the jail until he was found dead. (*Id.* at 297). There is a specific policy at 2.03 of the Detention Manual which provides for monitoring of an inmate charged with an alcohol related offense. (*Id.* at 348). This policy provides, in part:

> 2.03 CONDITION OF INMATE POLICY
>
> * * *
>
> Procedure:
>
> 1. *Observation*: The Detention Deputy shall carefully observe the physical condition and behavior of the inmate being admitted for symptoms that indicate need for medical treatment.
>
> 2. *Serious Injury*: If the injury, illness, or emotional state of the inmate appears serious, the Deputy shall first, contact his/her supervisor, and second;
>
> a. Refuse acceptance of custody and recommend that the arresting officer seek medical attention for the inmate;
>
> b. Not accept custody until the arresting officer provides documentation of the inmate's medical treatment. Note: Also see health history form.

3. *Detoxification*: Any inmate who is charged with being under the influence of alcohol or drugs or who has alcohol on his breath at the time of booking should be considered as a possible alcoholic. Inmates requiring detoxification or booked on drug charges will be placed in a holding cell for 4 to 6 hours or until sober and observed a minimum of every 30 minutes. The Detention Deputy shall determine whether an inmate is capable of making a phone call. The inmate will not be placed in the general population until after this time period. If medical problems occur during this time, the inmate may require transport to Norman Regional Hospital or Minor Emergency center.

Record medical observation on book-in form. Check for physical signs of withdrawal during the detoxification period. Certain symptoms signify the need for immediate medical attention, because untreated withdrawal can lead to a medical emergency.

a. The booking deputy will ask the arresting officer about blood alcohol level of the inmate which would mean referral elsewhere based on a high blood alcohol level. If the blood alcohol level is .30 or more the inmate will not be accepted. If the inmate is unconscious, he will not be accepted.

> b. If an inmate is booked into the facility under borderline conditions the Shift Supervisor will ensure that the inmate is checked at least every fifteen minutes.

These policies were deliberately and totally neglected by Deputies Epps and Brandon.

The Tenth Circuit noted that the medical examiner, Chai Choi, M.D., answered interrogatories on behalf of respondents stating that Ginn's cause of death was "[s]udden heart attack due to coronary artery disease" and that "the death was caused by heart attac[k] rather than acute alcohol intoxication." *Id.*, Vol. I, at 134 (Doc. 49-14). However, the examiner also stated that "I felt that the acute ethanol intoxication would be a participating factor to this death." *Id.* at 135. When asked if Ginn would have had the heart attack if there were no alcohol in his system, Choi stated, "I do not have an opinion (whether [Ginn] would have experienced the same heart attack without acute ethanol intoxication)." App. 8.

The Court further noted that petitioner's expert, Kenneth Desser, M.D., opined that Ginn "died as a result of severe ischemic heart disease, compounded by a toxic blood alcohol level and ventricular hypertrophy." *Id.*, Vol. II, at 388 (Aff. of Desser, Doc. 58-17). Desser stated that "Ginn should have been transported to a medical facility after he was taken into custody by law enforcement officers." *Id.* If Ginn were taken to a medical facility, Desser states "to a reasonable degree of medical certainty" that the

following would have occurred: the medical facility would have measured Ginn's blood alcohol level; that level would have exceeded 300 mg/dl, "which is associated with coma and depressed vital signs"; Ginn would have been kept in the facility for observation; while under observation Ginn would have "experienced an acute coronary syndrome and ventricular arrhythmia"; Ginn's cardiac experiences would have been reversed with medical supervision and treatment; after treatment, Ginn would have had either coronary bypass surgery or percutaneous coronary intervention; Ginn would have also been treated with "a beta blocker, aspirin, heparin, possibly nitroglycerin, oxygen and a statin"; and that, therefore, "this was a preventable death." *Id.* App. 9-10

The facts and issues in *Gibson v. County of Washoe, Nev.,* 290 F.3d 1175 (9th Cir. 2002) are relevant to the Ginn case. Gibson suffered a heart attack and died while in the custody of the Washoe County, Nevada, Sheriff's Department. Gibson's wife ("Ms. Gibson") brought a lawsuit under 42 U.S.C. § 1983, on behalf of herself, their two children, and Gibson's estate, against the County, the sheriff, and a number of the sheriff's deputies who were on duty at the Washoe County jail the night Gibson died. Ms. Gibson contended in the district court that the County and the individual respondents violated Gibson's substantive due process rights by the manner in which they treated him on the night he died. The district court granted summary judgment for the respondents. On appeal, the court determined that

summary judgment was improperly granted on the question whether the County was deliberately indifferent to Gibson's mental illness while he was in custody at the county jail.

Ms. Gibson alleged three causes of action: (1) that the individual deputies used excessive force on Gibson in violation of his due process rights; (2) that the individual deputies showed deliberate indifference to Gibson's serious mental health condition in violation of his substantive due process rights; (3) that the individual deputies' actions resulted from policies, practices or customs of the Washoe County sheriff's department, and these policies, practices or customs caused and/or contributed to Gibson's death, in violation of his due process rights. *Gibson* at 1184.

In addition to the County policies described above, Ms. Gibson asserted that several other policies contributed to Gibson's death. She contended that the lack of a system for communicating outstanding ATL's ("attempt to locate") from one shift to another, and from deputies on patrol to deputies or medical staff at the jail, revealed deliberate indifference to the constitutional rights of the mentally ill. Ms. Gibson also argued that the County failed adequately to train its deputies in recognizing and handling mentally ill individuals whom they encountered in the course of their duties. *Gibson* at 1184.

The court stated that at least two routes can lead to the conclusion that a municipality has inflicted a constitutional injury. First, a petitioner can show that

a municipality itself violated someone's rights or that it directed its employee to do so. *Board of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 404 (1994). Alternatively, in limited situations, a petitioner can demonstrate that a municipality is responsible for a constitutional tort committed by its employee, even though it did not direct the employee to commit the tort. *Id.,* at 406-07, 117 S. Ct. 1382; *Canton,* 489 U.S. at 387, 109 S. Ct. 1197. *Gibson* at 1185.

The court determined that, when viewed in the light most favorable to Ms. Gibson, the record demonstrates that the County's failure to respond to Gibson's urgent need for medical attention was a direct result of an affirmative County policy that was deliberately indifferent, under the *Farmer* standard, to this need. To find the County liable under *Farmer,* the County must have (1) had a policy that posed a substantial risk of serious harm to Gibson; and (2) known that its policy posed this risk. *Id.* at 837, 114 S. Ct. 1970. *Gibson* at 1189.

The court concluded that standing alone, the medical screening policies were constitutional. But there is a critical exception to these procedures: "The Medical Screening process *will be delayed* if the inmate is combative, uncooperative or unable to effectively answer questions due to intoxication." (emphasis added). This mandatory exception to the County's normal medical screening procedures poses a substantial risk of serious harm to those with certain mental illnesses. This exception resulted in

the failure to treat Gibson's serious medical needs. *Gibson* at 1189. Similarly, Ginn's condition was ignored when he was taken directly to his cell without any medical screening.

According to an autopsy report, the immediate cause of Gibson's death was severe arteriosclerosis, a disease of which neither he nor Ms. Gibson had been aware. The respondents' medical expert testified that the "entire milieu" of Gibson's uncontrolled manic state and the officers' efforts to restrain him "resulted in a physiologically stressful state for Mr. Gibson, which essentially resulted in a heart attack." *Gibson* at 1183.

The court determined that there was evidence in the record to support the inference that if the medical staff had evaluated Gibson, prevented him from entering the jail, and directed him to a mental hospital, Gibson almost certainly would have received the care he needed, rather than face conditions that worsened his outlook. Likewise, in Ginn's case, Dr. Desser, indicated that Ginn's blood alcohol level was associated with coma and depressed vital signs. Dr. Desser also concluded that Ginn should have been taken to the hospital and received successful treatment.

In *Gibson* the court found that a plethora of circumstantial evidence could lead a reasonable jury to infer that the County was aware of the risk that its policies presented.

First, a jury could conclude that County policymakers knew that inevitably some prisoners arrive at the jail with urgent health problems requiring hospitalization. The fact that County policy requires that detainees be checked for medical conditions requiring immediate attention indicates such knowledge. Second, the County's policies make it clear that policymakers were keenly aware that mental illness, and manic phases in particular, were within the range of health problems that would sometimes require urgent care. *Gibson* at 1190. Third, the record suggests that the County not only knew that it had to treat the mentally ill in order to avoid harm, but that it had made a practice of ignoring this need. *Id.* at 1191. The first two policies, as they relate to alcohol intoxication, are also essentially present in Ginn's case.

The County argued that even if it was deliberately indifferent to Gibson's mental health condition, this deliberate indifference did not cause Gibson's death because the County neither knew nor had reason to know that a fatal heart attack would result from ignoring Gibson's severe mental health condition. The court rejected this argument for two reasons. In the first place, there is sufficient evidence in the record on which a jury could find that death is a foreseeable result of not treating a manic person and placing him in a penal setting. Also, a doctor with the Nevada Department of Investigation, testified that an untreated person in a manic state "can easily die in a prison system," and that a rapid pulse and increased blood pressure are commonly associated

with manic bouts. Although the precise way in which Gibson died may not have been foreseeable, the extreme stress on Gibson's system and the possibility that this stress would trigger a fatal reaction of some sort were foreseeable. *Gibson* at 1193.

The same conclusion is appropriate in the Ginn case. Death or serious injury was a foreseeable result for Ginn based on his .32% blood alcohol level, his symptoms, and his behavior. As noted by Dr. Desser, this level is associated with coma and depressed vital signs. Common sense dictates that all of the deputies and Sheriff Beggs were aware of the danger of consuming excessive amounts of alcohol. Dr. Choi stated in her Report of Autopsy that acute ethanol intoxication would be a contributory factor to Ginn's death. (Aplt. App. Vol. II at 333). Dr. Desser stated the death was compounded by the toxic blood alcohol level. (Aplt. App. Vol. II at 388).

## CONCLUSION

Ginn was admitted to the jail for public intoxication. He was highly intoxicated with .32% blood alcohol level. This alcohol blood level is associated with coma and depressed vital signs. The detention deputies were not given any tools or training to determine the dangerous condition of Ginn. Despite the fact that people were arrested for public intoxication practically on a daily basis, there was no specific

training to educate the deputies on how to successfully identify and monitor the severely intoxicated. Sheriff Beggs has adopted a policy that he will not authorize a breathalyzer test for someone arrested for public intoxication. A breathalyzer test would be an excellent tool to evaluate the danger and risk to an inmate. The total breakdown by the deputies in failing to communicate with each other about the quantity of alcohol consumed by Ginn, along with the facts that he had fallen, apparently hit his head, may have been unconscious, and was hallucinating, reveal a fundamental breakdown in training and supervision. Then these deficiencies are compounded by the failure to follow detention policies to medically screen and monitor Ginn. In accordance with their standard practice, if someone is too intoxicated to cooperate and communicate, Ginn was taken directly back to his cell. He essentially was left alone for 3 hours when he should have been receiving medical care. Based on the alcohol testing policy implemented by Beggs, if Ginn had been arrested for DUI instead of public intoxication, Ginn would have been taken to the hospital. Instead, in this case, Ginn was taken straight back to a cell and left alone.

Even if the court does not find that any individual was deliberately indifferent, this is a classic case of a collective deliberate indifference by the County which caused a "systemic injury." In essence, the conduct by the County, through the deputies and policies and practices created by Sheriff Beggs, amounted to a corporate deliberate indifference.

The Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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563 F.3d 1082

United States Court of Appeals,
Tenth Circuit.
Ginger MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn,
Plaintiff-Appellant,
v.
DeWayne BEGGS, as Sheriff of Cleveland County; David Epps, Kevin Brandon; Cleveland County Board of County Commissioners; Tommy Edwards; Gilbert Kirkland,
Defendants-Appellees.
**No. 08-6042.**

April 21, 2009.

T. David Hasbrook of Hasbrook & Hasbrook, Oklahoma City, OK, for Plaintiff-Appellant.

David W. Lee (with Ambre C. Gooch on the brief), of Lee & Gooch, P.C., Oklahoma City, OK, for Defendants-Appellees.

Before KELLY, BRISCOE, and McCONNELL, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff-Appellant Ginger Martinez, individually and on behalf of the estate of her father, Kenneth Wayne **Ginn**, filed a 42 U.S.C. § 1983 action against the Board of County Commissioners of Cleveland County Oklahoma, Sheriff DeWayne **Beggs**, and Deputies Kevin Brandon, Tommy Edwards, David Epps, and Gilbert Kirkland alleging violations of the

Fourteenth Amendment to the United States Constitution for deliberate indifference to **Ginn's** serious medical needs after **Ginn** died while in police custody.

The district court granted summary judgment in favor of defendants on qualified immunity grounds after concluding that Martinez had failed to show a genuine issue of material fact with respect to the subjective component of deliberate indifference, and, thus, had failed to show a constitutional violation. Martinez appeals. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

## I

Ginn died on the evening of May 2, 2006, in the Cleveland County Detention Center (the "detention center") in Noble, Oklahoma, a few hours after his arrest for public intoxication. An autopsy conducted after his death revealed that Ginn had a blood alcohol level of 0.32%. According to the medical examiner's report, the cause of death was heart attack, and alcohol may have been a contributing factor.

At 5:16 p.m. on the day of Ginn's death, the police received a call reporting a fight in progress. The fight was outside the home of Teresa Carlson. Three officers responded to the call within a few minutes of one another – defendants Kirkland and Edwards, and Barbara McSwain, who is not a defendant in this case.

Kirkland arrived first and noticed Ginn sitting on the ground in a section of unfinished porch, between two porch runners approximately two feet off the ground.[1] Kirkland did not see how Ginn came to be on the ground, so he asked Ginn if he was alright and if he needed any medical assistance. Ginn said that he was alright and did not need medical assistance. When asked if he had been drinking, Ginn said, "yes." Aplt.App., Vol. I, at 92 ¶ 5 (Aff. of Kirkland, Doc. 49-2). Kirkland noticed that Ginn's speech was slurred, his eyes were bloodshot, and he smelled of alcohol.

Carlson was standing nearby, and she told Kirkland that Ginn was a neighbor who visited often. She also reported that Ginn had fallen and that he had appeared to be knocked out for a short time. She stated that "Ginn had drunk an entire bottle of whiskey," "Ginn seemed to be hallucinating and seeing people trying to get him," and "that [Carlson] thought Ginn needed to go to the doctor." *Id.*, Vol. II, at 255-56 ¶ 13 (Aff. of Carlson, Doc. 59-5). Additionally, Carlson told Kirkland that Ginn tried to fight her daughter. Carlson told Kirkland that she did not want to press charges; she only wanted Ginn off of her property.

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[1] The district court interpreted "porch runners" to be floor joists and concluded that "Mr. Ginn's presence in that position would be reliable evidence from which it could fairly have been inferred by the officers at the scene that Mr. Ginn was intoxicated to the point of not being able to move about without some risk of mishap." Aplt.App., Vol. II, at 465 n. 2 (Order at 3 n. 2).

Edwards arrived next, and Kirkland told him what had happened, including that Ginn had drunk a lot of alcohol. Edwards approached Ginn, who was still in the unfinished porch area, and told him that the police would have to take him home. Ginn responded by asking Edwards if he wanted to fight and threatening to "kick his ass." *Id.*, Vol. I, at 101 ¶ 5 (Aff. of Edwards, Doc. 49-4). According to Carlson, one of the officers asked Ginn if he wanted to go to the hospital and Carlson believes Ginn did not respond. When Carlson told the officer to call the paramedics, she was told to "shut up and go inside."[2] *Id.*, Vol. II, at 256 ¶ 16.

McSwain was the last officer to arrive. Ginn had not moved from the unfinished porch area. McSwain informed Kirkland and Edwards that she knew Ginn personally and that Ginn was an alcoholic. McSwain tried to convince Ginn to go home or to let the officers take him home. McSwain could tell from Ginn's reaction that he recognized her. Ginn replied that he did not want to go home and again threatened to fight the officers. The officers then informed Ginn that if he did not leave Carlson's property, they would have

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[2] Carlson's affidavit does not identify the speaker of these words. However, because it is more favorable to Martinez, we assume that one of the officers, and not Ginn, told Carlson to "shut up and go inside." *See* Aplt.App., Vol. II, at 256 ¶ 16 ("I then told the deputy he should call the paramedics. I was told to 'shut up and go inside.' ").

no choice but to arrest him for public intoxication. Ginn refused to leave.

Edwards arrested Ginn for public intoxication. Ginn was generally uncooperative during the arrest and would not get up from the ground. According to Edwards, when Edwards reached down to help Ginn up, Ginn took a swing at Edwards and said "don't touch me." *Id.*, Vol. I, at 102 ¶ 7. After Ginn was handcuffed near the porch area, "Ginn was unsteady on his feet, but he walked entirely on his own two feet and [Edwards and Kirkland] did not carry him." *Id.* ¶ 8. According to Carlson and her daughter, Misty Fisher, the officers picked Ginn up and dragged him to the patrol car. The arrest affidavit, signed by Edwards, reported that Ginn "was unable to stand." *Id.*, Vol. II, at 253. Kirkland transported Ginn to the detention center.

Before the officers left, Carlson saw Ginn slumped over in the back seat of the patrol car, and she worried that he had passed out. Kirkland stated that Ginn was awake for the beginning of the ride, sitting upright and complaining about the handcuffs being too tight. Kirkland suggested that Ginn lie down to relieve the pressure on his wrists, and Ginn did as suggested. Kirkland thought Ginn "had passed out, like most of your drunks do," *id.*, Vol. II, at 231:15-16 (Dep. of Kirkland, Doc. 59-2), but Ginn was awake when they arrived at the detention center. The drive took approximately fifteen to twenty minutes.

The officers did not administer a breath analyzer test or blood alcohol test to Ginn. According to McSwain, such tests are only administered to suspects arrested for drunk driving offenses, and not to suspects arrested for public intoxication. The rationale for administering a breath analyzer test for drunk driving and not for public intoxication is that Oklahoma law does not require evidence of a person's blood/alcohol concentration to establish public intoxication.

At approximately 6:30 p.m.,[3] Kirkland and Ginn arrived at the detention center. Brandon helped remove Ginn from the car and helped him to a receiving cell. Video surveillance from the detention center shows Brandon and Epps escorting Ginn down a hallway toward the receiving cell. Ginn could not walk in a straight line and the officers kept him from veering into the hallway walls. The officers helped to support Ginn's weight, but they did not completely carry him.

The detention center manual provides:

> Any inmate who is charged with being under the influence of alcohol or drugs or who has alcohol on his breath at the time of booking

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[3] Brandon's affidavit states the time as 7:25 p.m. The Oklahoma State Bureau of Investigation report states that Ginn arrived at the detention center around 6:30 p.m. For purposes of this appeal from the grant of summary judgment, we assume Ginn arrived at 6:30 p.m. since that time is more favorable to Martinez.

> should be considered as a possible alcoholic. Inmates requiring detoxification or booked on drug charges will be placed in a holding cell for 4 to 6 hours or until sober and observed a minimum of every 30 minutes. . . .
>
> The booking deputy will ask the arresting officer about blood alcohol level of the inmate which would mean referral elsewhere based on a high blood alcohol level. If the blood alcohol level is .30 or more the inmate will not be accepted. If the inmate is unconscious, he will not be accepted. . . .
>
> If an inmate is booked into the facility under borderline conditions the shift Supervisor will ensure that the inmate is checked at least every fifteen minutes.

*Id.*, Vol. II, at 349 (Manual, Doc. 59-14). According to Brandon,

> it is not uncommon for an intoxicated person to be taken directly to receiving, before being formally processed into the [detention center]. This occurs when the intoxicated person is unable, due to his/her intoxication, to answer routine questions asked during processing. So, the intoxicated person is placed in a receiving cell for up to four hours to allow him/her to sober up enough to answer routine processing questions, such as personal history, family contact numbers, and medical information.

*Id.*, Vol. I, at 114 ¶ 5.

After Brandon and Epps took Ginn to the cell, Ginn complied with a request to kneel down so his handcuffs could be removed. Brandon, Epps, and Kirkland last saw Ginn alive and resting his head on his arms on his cell bench.

That evening, both Brandon and Epps were responsible for conducting sight checks of all people housed on the first floor of the detention center, including Ginn. However, no one logged in a sight check of Ginn that evening.

At approximately 9:35 p.m., about three hours after Ginn first arrived at the detention center, Brandon returned to the receiving cell and found Ginn dead, with his body in a kneeling position. Brandon called for back-up, checked vital signs, and attempted life saving procedures, including trying to use an automatic defibrillator. Fire department officials arrived and determined that Ginn was dead.

The medical examiner, Chai Choi, M.D., answered interrogatories on behalf of defendants stating that Ginn's cause of death was "[s]udden heart attack due to coronary artery disease" and that "the death was caused by heart attac[k] rather than acute alcohol intoxication." *Id.*, Vol. I, at 134 (Doc. 49-14). However, the examiner also stated that "I felt that the acute ethanol intoxication would be a participating factor to his death." *Id.* at 135. When asked if Ginn would have had the heart attack if there were no alcohol in his system, Choi stated, "I do not have an opinion (whether [Ginn] would have experienced

the same heart attack without acute ethanol intoxication)." *Id.*

Plaintiff's expert, Kenneth Desser, M.D., opined that Ginn "died as a result of severe ischemic heart disease,[4] compounded by a toxic blood alcohol level and ventricular hypertrophy."[5] *Id.,* Vol. II, at 388 (Aff. of Desser, Doc. 59-17). Desser stated that "Ginn should have been transported to a medical facility after he was taken into custody by law enforcement officers."[6] *Id.* If Ginn were taken to a medical facility, Desser states "to a reasonable degree of medical certainty" that the following would have occurred: the medical facility would have measured Ginn's blood alcohol level, that level would have exceeded 300 mg/dl, "which is associated with coma and depressed vital signs"; Ginn would have been kept in the facility for observation; while under observation Ginn would have "experienced an acute coronary syndrome and ventricular arrhythmia"; Ginn's cardiac experiences

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[4] Severe ischemic heart disease is a "deficiency of blood supply due to obstruction of the circulation to [the heart.]" *Taber's Cyclopedic Medical Dictionary* 947 (Clayton L. Thomas, ed., 16th ed.1989).

[5] Ventricular hypertrophy is the "[i]ncreased size and muscular content of the myocardium of the ventricles," or lower chambers in the heart. *Taber's, supra* note 4, at 870.

[6] Desser gives no support for why officers "should have" transported Ginn to a hospital. For example, Desser does not list any observable symptoms Ginn would have displayed due to his intoxication that should have alerted officers to a substantial risk of serious harm.

would have been reversed with medical supervision and treatment; after treatment, Ginn would have had either coronary bypass surgery or percutaneous coronary intervention[7]; Ginn would have also been treated with "a beta blocker, aspirin, heparin, possibly nitroglycerin, oxygen and a statin"; and that, therefore, "this was a preventable death." *Id.*

II

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. *Reeves v. Churchich,* 484 F.3d 1244, 1250 (10th Cir.2007). Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

"[W]e review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir.2001). When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the

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[7] A percutaneous coronary intervention can be any of a variety of procedures used to alter the structure of the blood vessels that supply blood to the heart muscle, such as the insertion of a stent. *See Taber's, supra* note 4, at 101 (defining "angioplasty"), 416 (defining "coronary"), 932 (defining "intervention"), 1356 (defining "percutaneous").

defendant violated a constitutional right and (2) the constitutional right was clearly established. *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 815-16, 172 L.Ed.2d 565 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). In *Pearson*, the Supreme Court held that the court has discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818. In this case, because defendants did not violate Ginn's constitutional rights, we need not address whether those rights were clearly established.

Under the Fourteenth Amendment due process clause, "pretrial detainees are . . . entitled to the degree of protection against denial of medical attention which applies to convicted inmates" under the Eighth Amendment. *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir.1985). A claim for inadequate medical attention will be successful if the plaintiff shows "'deliberate indifference to serious medical needs.'" *Estate of Hocker v. Walsh*, 22 F.3d 995, 998 (10th Cir.1994) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). The Supreme Court cautioned that "an inadvertent failure to provide adequate medical care" does not rise to a constitutional violation. *Estelle*, 429 U.S. at 105-06, 97 S.Ct. 285.

*A. Objective Component*

The test for deliberate indifference is both objective and subjective. *Callahan v. Poppell,* 471 F.3d 1155, 1159 (10th Cir.2006). The objective component of the test is met if the "harm suffered rises to a level 'sufficiently serious' to be cognizable under the Cruel and Unusual Punishment Clause" of the Eighth Amendment. *Mata v. Saiz,* 427 F.3d 745, 752-53 (10th Cir.2005) (quoting *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). In *Mata,* we explained that it is the harm claimed by the prisoner that must be sufficiently serious to satisfy the objective component, and not solely "the symptoms presented at the time the prison employee has contact with the prisoner." 427 F.3d at 753.

As to the objective component of the test for deliberate indifference, Martinez simply contends, "Obviously, death satisfies this requirement." Aplt. Br. at 16. Martinez does not claim that intoxication alone is a sufficiently serious harm. We agree with Martinez and the district court that "the ultimate harm to Mr. Ginn, that is, his heart attack and death, w[as], without doubt, sufficiently serious to meet the objective component" necessary to implicate the Fourteenth Amendment. Aplt.App., Vol. II, at 478 (Order at 16).

*B. Subjective Component*

Having determined that the selected harm is sufficiently serious to meet the objective component,

we "can turn to causation and the subjective prong." *Mata,* 427 F.3d at 753. "To prevail on the subjective component, the prisoner must show that the defendants knew he faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it." *Callahan,* 471 F.3d at 1159 (internal quotation marks omitted). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837, 114 S.Ct. 1970. Unlike the objective component, the symptoms displayed by the prisoner are relevant to the subjective component of deliberate indifference. The question is: "were the symptoms such that a prison employee knew the risk to the prisoner and chose (recklessly) to disregard it?" *Mata,* 427 F.3d at 753.

The factfinder may conclude that a prison official subjectively knew of the substantial risk of harm by circumstantial evidence or "from the very fact that the risk was obvious." *Farmer,* 511 U.S. at 842, 114 S.Ct. 1970. However, the Supreme Court has cautioned that an obvious risk cannot conclusively establish an inference that the official subjectively knew of the substantial risk of harm, because "a prison official may show that the obvious escaped him." *Id.* at 843 n. 8, 114 S.Ct. 1970.

Finally, the subjective component requires the prison official to disregard the risk of harm claimed by the prisoner.[8] Our decision in *Estate of Hocker v. Walsh,* 22 F.3d 995 (10th Cir.1994) is instructive. In *Hocker,* Hocker was placed in a detention center while intoxicated and at times incoherent or "would not wake up." 22 F.3d at 997. Two days later, she was discovered dead in her cell, having hung herself from the upper bunk.*Id.* Plaintiffs argued that the detention center's policy of admitting intoxicated and unconscious individuals showed deliberate indifference, but that argument was "flawed." *Id.* at 998. Instead, we concluded that the plaintiffs were required to show that defendants were deliberately indifferent to

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[8] Martinez seems to argue that deliberate indifference does not require any connection between the subjective disregard of a risk of serious harm and the objective harm actually claimed. She states that "[a] general awareness of the potential for harm is enough." Aplt. Br. at 26. Martinez cites to *Farmer,* 511 U.S. at 825, 114 S.Ct. 1970, and *Winton v. Bd. of Comm'rs of Tulsa County,* 88 F.Supp.2d 1247 (N.D.Okla.2000) (interpreting *Farmer*) for support. However, *Farmer* and *Winton* are both prisoner assault cases, and the holding in these cases is that the officers need not identify the specific assailant, but need only recognize the substantial risk of the claimed harm-assault. *See Farmer,* 511 U.S. at 843, 114 S.Ct. 1970; *Winton,* 88 F.Supp.2d at 1265. As regards the relationship between the disregard of a substantial risk of serious harm and the objective harm claimed, prisoner assault cases like the case at bar still require the officers' subjective disregard of a risk of serious harm, whether the harm is assault, or a heart attack and death. Here, Martinez has not presented evidence to create an issue of material fact regarding the defendants' subjective disregard of Ginn's risk of heart attack or death.

the *specific risk* of suicide, and not merely to the risk of intoxication. *Id.* at 1000. In the case before us, the defendants must subjectively disregard the risk of Ginn's claimed harm – death and heart attack – and not merely the risks of intoxication.

*1. Individual County Defendants*

Martinez contends that the district court erred in concluding that there was no issue of material fact regarding the subjective component of deliberate indifference as to each of the individual county defendants.

Martinez argues that a jury could find that Kirkland and Edwards, the arresting officers, subjectively knew that Ginn faced a substantial risk of serious harm. The arresting officers knew that Ginn consumed an entire bottle of whiskey, he could not walk without help, he may have been unconscious for a short time, he was talking as if he were hallucinating, and Carlson thought he needed medical care. Carlson told the arresting officers that she thought Ginn needed medical care, and they told her to "shut up and go inside."

Martinez additionally argues that a jury could find that the custodial officers, Brandon and Epps, subjectively knew that Ginn faced a substantial risk of serious harm. The custodial officers knew that Ginn was drunk, too incoherent to be booked into jail, had difficulty walking, had not been medically screened, and was left alone in the receiving cell.

Policies required the custodial officers to visually check on Ginn, yet the officers failed to log in any sight checks for Ginn between his arrival at 6:30 p.m., and when he was found dead at 9:35 p.m.

However, the sufficiently serious objective harm that Ginn faced was heart attack and death, and not acute intoxication. We agree with the district court's determination that there was "no evidence in the record of any symptoms or signs indicating that Mr. Ginn would suffer from a heart attack." Aplt.App., Vol. II, at 479 (Order at 17); *see also* Aplee. Br. at 32 ("Ginn's only external appearance was that he was intoxicated, and voluntarily so."). Additionally, the district court noted that officers did not know Ginn's blood alcohol level, there was no evidence that Ginn was in pain or distress, and at all times Ginn was conscious and understood that he was being arrested. The officers subjectively knew that Ginn was intoxicated, but there is no evidence to show that anyone would have known that Ginn would face an imminent heart attack or death, much less that the individual county defendants subjectively knew that Ginn was at risk of heart attack or death.

Martinez argues that this case is "very similar" to *Garcia v. Salt Lake County,* 768 F.2d 303 (10th Cir.1985). Aplt. Br. at 16. In *Garcia,* Garcia was arrested for driving under the influence of alcohol after a traffic accident. 768 F.2d at 305. He was transported to the hospital for back pains, where he ingested an overdose of barbiturates and escaped from the hospital. *Id.* Police found him passed out on

the pavement outside the hospital, and a medical doctor, with no knowledge of the barbiturate overdose, declared him semi-conscious. *Id.* Garcia, still semi-conscious or unconscious, was released from the hospital to be jailed around 3:45 p.m., and officers were told to observe him. *Id.* There was no physician at the jail "most of the time." *Id.* at 308. The jail medic instructed that Garcia was to be checked every fifteen to twenty minutes. *Id.* at 305. Instead, the officers checked Garcia only every thirty minutes. *Id.* at 305-06. At 8:30 p.m., the medic reexamined Garcia, and he was still unconscious. *Id.* at 306. When Garcia was checked at 10:15 p.m., he appeared to be dead. *Id.* Garcia was then transferred to the hospital, monitored on life support, and ultimately life support was discontinued. *Id.* An expert testified that Garcia would have survived if he had been transported to the hospital when he was examined and determined to be still unconscious at 8:30 p.m. *Id.*The jury found for the plaintiffs on their 42 U.S.C. § 1983 claim based on the deliberate indifference of the county policy of admitting unconscious persons into the jail and the jail's medical staffing deficiencies, and we affirmed. *Id.* at 308.

We agree with defendants that the facts of *Garcia* are distinguishable. Although defendants in *Garcia* were aware that Garcia was unconscious for many hours, they took no action to attend to his obvious medical needs. By comparison, Ginn was conscious, on his feet, argumentative, and cognizant that he was being arrested. Ginn exhibited "characteristics

that are common to many intoxicated individuals." Aplee. Br. at 36. Whereas the practice of admitting to the understaffed jail unconscious individuals suspected of intoxication shows a deliberate indifference to an obvious and substantial risk of serious harm, **Ginn** was not unconscious and showed no obvious symptoms indicating a risk of serious harm. Nothing in the record indicates that **Ginn** exhibited symptoms that would predict his imminent heart attack or death.

*2. Sheriff **Beggs** and the County*

Martinez contends that **Beggs** and the county should be held liable for **Ginn's** death because: (1) county policies and customs showed a deliberate indifference to the serious medical needs of intoxicated detainees, and (2) **Beggs** failed to adequately train and supervise officers regarding how to handle intoxicated detainees.[9] Martinez asserts her claims

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[9] Specifically, Martinez argues the following theories of liability in her brief, all of which amount to a claim against the county regarding police policies and customs or a failure to train and supervise: (1) the county is liable for any unconstitutional policies implemented by **Beggs**; (2) the county is liable for **Beggs'** failure to adequately train the officers; (3) **Beggs** is liable for his "personal participation" if he knew or should have known he would cause other officers to inflict unconstitutional policies, Aplt. Br. at 23; (4) **Beggs** is liable under the theory of supervisory liability; (5) **Beggs** is responsible for the detention center policies; and (6) the county is liable for a pattern of unconstitutional behavior.

against **Beggs** "in both his individual capacity and his official capacity," Aplt. Br. at 19, but she does not argue that **Beggs** should be liable for any actions he took on May 2, 2006.[10] Rather, Martinez contends **Beggs** should be held liable for the actions of the officers he trained and supervised. To the extent Martinez brings a claim against **Beggs** in his official capacity, it is the same as bringing a suit against the county. *See, e.g., Myers v. Okla. County Bd. of County Comm'rs,* 151 F.3d 1313, 1316 n. 2 (10th Cir.1998).

A county or sheriff in his official capacity cannot be held "liable for constitutional violations when there was no underlying constitutional violation by any of its officers." *Olsen v. Layton Hills Mall,* 312 F.3d 1304, 1317-18 (10th Cir.2002) (internal quotations marks and brackets omitted). "[E]ven if," as Martinez argues, the "policies, training, and supervision [of the individual county defendants] were unconstitutional, the [county] cannot be held liable where, as here, the officers did not commit a constitutional violation." *Trigalet v. City of Tulsa,* 239 F.3d 1150, 1155-56 (10th Cir.2001); *see also City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental

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[10] **Beggs** was not present at Carlson's house or at the detention center on May 2, 2006. Therefore, **Beggs** cannot be liable under a theory that alleges his direct participation in the events leading up to **Ginn's** death.

regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.").

Likewise, **Beggs** cannot be held liable in his individual capacity for implementing county policies or for the actions of county officers under a theory of supervisory liability, when there was no violation of **Ginn's** constitutional rights. *See Fogarty v. Gallegos,* 523 F.3d 1147, 1162 (10th Cir.2008) (explaining that supervisory liability requires a constitutional deprivation affirmatively linked to the supervisor's personal participation).

As we have concluded that the individual county defendants (Kirkland, Edwards, Brandon, and Epps) did not violate **Ginn's** constitutional rights, **Beggs** and the county cannot be held liable as a matter of law.

*3. County Liability for "Systemic Injury"*

Martinez finally argues that if no single individual county employee is found liable, the county may still be liable for a "systemic injury" caused by "the interactive behavior of several government officials, each of whom may be acting in good faith." Aplt. Br. at 27 (citing *Owen v. City of Independence,* 445 U.S. 622, 652, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)). As evidence of a "systemic injury," Martinez outlines the same concerns discussed above regarding lack of officer training and detention center policies (1) to not administer breath analyzer tests to people

arrested for public intoxication, and (2) to allow intoxicated detainees to sober up in a cell for four to six hours prior to booking. To the extent this argument pertains to the county's customs and policies, it has been addressed above. To the extent this argument suggests that the county can be liable, even if no individual government actor is liable, it is precluded by our prior precedent. *See, e.g., Olsen,* 312 F.3d at 1318 ("We will not hold a municipality liable for constitutional violations when there was no underlying constitutional violation by any of its officers." (internal quotation marks and alterations omitted)).

### *C. Admissibility of the Detention Center Manual*

Finally, we need not reach the defendants' argument that the detention center manual and its policies are inadmissible as irrelevant and as a possible source of jury confusion. Even assuming the detention center manual and its policies are admissible for purposes of this appeal, the evidence does not create a genuine issue of material fact as to the subjective component of deliberate indifference to serious medical needs.

We affirm the district court's grant of summary judgment in favor of defendants.

2008 WL 200261

United States District Court,
W.D. Oklahoma.

Ginger MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn, Plaintiffs,

v.

DeWayne BEGGS, as Sheriff of Cleveland County, et al., Defendants.

**No. CIV-07-132-F.**

Jan. 24, 2008

T. David Hasbrook, T. David Hasbrook PC, Oklahoma City, OK, for Plaintiffs.

Ambre C. Gooch, David W. Lee, Comingdeer Lee & Gooch, Nevin R. Kirkland, Edmonds Cole Law Firm, Oklahoma City, OK, David J. Batton, Norman, OK, for Defendants.

***ORDER***

STEPHEN P. FRIOT, District Judge.

Before the court is Defendants' Motion for Summary Judgment, filed November 1, 2007 (doc. no. 49). Plaintiffs have responded and defendants have thereto replied. Upon due consideration of the parties' submissions and the relevant law, the court makes its determination.

*Background*

Kenneth Wayne Ginn died in the Cleveland County Detention Center on May 2, 2006, within hours after being arrested for public intoxication. Ginger Martinez, Mr. Ginn's daughter, brings this 42 U.S.C. § 1983 action individually and as personal representative of the estate of Mr. Ginn, alleging that defendants, DeWayne Beggs, Kevin Brandon, David Epps, Tommy Edwards and Gilbert Kirkland, in their individual and official capacities, violated Mr. Ginn's constitutional rights under the Fourteenth Amendment.[1] Specifically, plaintiffs allege that each of the defendants demonstrated deliberate indifference to Mr. Ginn's serious medical needs. Plaintiffs also allege state law claims of negligence against defendant, Board of County Commissioners of Cleveland County. Defendants seek summary judgment on plaintiffs' claims.

*Standard of Review*

Under Rule 56(c), Fed.R.Civ.P., summary judgment shall be granted if the record shows that, "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The moving party has the burden of showing the

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[1] In the Second Amended Complaint filed on August 7, 2007, plaintiffs include as defendants, Jeffrey Jones, Charles L. Carter and James Bullard. Plaintiffs' claims against these defendants, however, have been previously dismissed without prejudice pursuant to stipulations of dismissal.

absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there is a genuine issue for trial. *Posey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir.1983).

*Relevant Facts*

Viewed in a light most favorable to plaintiffs, as the non-moving parties, the relevant facts are as follows. At approximately 5:16 p.m. on May 2, 2006, defendant, Tommy Edwards ("Edwards"), a field deputy with the Cleveland County Sheriff's Office ("CCSO"), was dispatched to a fight in progress call at a house in Noble, Oklahoma. The dispatcher advised Edwards that the caller was an eleven year old boy and that the details of the fight were unclear. Edwards arrived at the scene at approximately 5:28 p.m. Defendant, Gilbert Kirkland ("Kirkland"), a reserve deputy with CCSO, responded as backup for

Edwards for the call. Although Kirkland was backup for Edwards, Kirkland actually arrived at the scene at 5:22 p.m.

Upon Kirkland's arrival, he noticed a house with an unfinished porch. Kirkland observed an adult male, whom he later learned to be Kenneth Wayne Ginn, sitting on the ground in the portion of the unfinished part of the porch. Mr. Ginn was sitting on the ground between two porch runners,[2] both of which stood approximately two feet above the ground. Kirkland did not see how Mr. Ginn actually ended up on the ground, but Kirkland approached Mr. Ginn and asked him if he was alright, and Mr. Ginn stated that he was alright. Kirkland asked Mr. Ginn if he had been drinking and Mr. Ginn stated "Yes." Mr. Ginn's speech was slurred, his eyes were bloodshot, and Kirkland could smell an odor of alcohol.

Teresa Carlson ("Carlson"), an adult female, opened the door of the house to talk to Kirkland. She informed Kirkland that Mr. Ginn was a neighbor who visited often, that he had consumed a bottle of whiskey, and that he tried to fight her daughter,

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[2] "Runners" is the term used by defendant Kirkland in his affidavit and by defendants in their brief. Kirkland aff., ¶ 4; brief at 6. In context, it appears that this is a reference to exposed floor joists in the unfinished part of the porch. As relevant here, and viewing the record most favorably to the plaintiff, Mr. Ginn's presence in that position would be reliable evidence from which it could fairly have been inferred by the officers at the scene that Mr. Ginn was intoxicated to the point of not being able to move about without some risk of mishap.

whom Kirkland presumed was the young adult female standing nearby. Carlson told Kirkland that she had asked Mr. Ginn to leave, and that as he was leaving, he fell to the ground inside the unfinished portion of the porch, and she simultaneously motioned toward Mr. Ginn and where he was on the ground. Carlson told Kirkland that Mr. Ginn appeared to be knocked out for a short time. She told Kirkland that Mr. Ginn "seemed to be hallucinating and seeing people trying to get him." Affidavit of Teresa Carlson, ¶ 13. She told him that she thought he needed to go to the doctor. Carlson told Kirkland that she did not want to press charges against Mr. Ginn, she just wanted him off her property.

When Edwards arrived at the scene, Kirkland explained the situation. Edwards approached Mr. Ginn and told him to get up and they would take him home. Mr. Ginn asked Edwards if he wanted to fight and told Edwards that he would kick Edwards' "ass." Edwards told Mr. Ginn that he did not want to fight, that he needed to get up and go home.

According to Kirkland's affidavit, he did not observe any injury of any kind on Mr. Ginn, but asked him if he needed any medical assistance and Mr. Ginn stated he did not. Affidavit of Gilbert Kirkland, ¶ 5. According to Carlson's affidavit, one of the deputies asked Mr. Ginn if he wanted to go to the

hospital and she did not believe that he responded.[3] She told the deputy he should call the paramedics. According to Carlson, she was told to "shut up and go inside." Affidavit of Teresa Carlson, ¶ 16.

Barbara McSwain ("McSwain"), a deputy sheriff with CCSO, had heard the fight call to Edwards and also responded to the call. She recognized the address for the subject house as one where illegal drug activity had previously occurred. She also recognized the address as being very near to the residence of Mr. Ginn, a man she had known personally for two years. She knew that Mr. Ginn was an alcoholic.

McSwain arrived at approximately 5:36 p.m. Mr. Ginn was still in the same position and location as when Kirkland initially arrived. Edwards explained the situation. McSwain told Edwards and Kirkland that she knew Mr. Ginn personally and that he was an alcoholic. McSwain then attempted to convince Mr. Ginn to go home or to let one of the deputies take him home. McSwain could tell from Mr. Ginn's reaction that he recognized her. He responded, with slurred speech, that he was not going anywhere and that he was going to kick "ass."

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[3] After Mr. Mr. [sic] Ginn's death, the Oklahoma State Bureau of Investigation conducted an investigation. In the report of the interview of Teresa Carlton on May 12, 2006, it was stated that Kirkland asked "GINN if he wanted to go the emergency room to get checked out, and GINN again declined any medical treatment." Plaintiff's Exhibit K, p. 20. The court, however, views the evidence in a light most favorable to plaintiffs.

According to the affidavit of Carlson's daughter, Misty Fisher, she told the deputies that Mr. Ginn had consumed an "entire large bottle of Crown Royal on the way home from town." She also told them that he "had been talking as if he was seeing someone." Plaintiff's Exhibit J, ¶ 17.

Because Carlson had said that she wanted Mr. Ginn off her property, the deputies told Mr. Ginn that if he did not go home, they would arrest him for public intoxication. He continued to refuse to leave. Edwards advised Mr. Ginn he was placing Mr. Ginn under arrest for public intoxication. Edwards told Mr. Ginn to stand up. When did [sic] he did not, Edwards reached down toward Mr. Ginn's arm to assist him up. Mr. Ginn took a swing at Edwards and said "don't touch me." Edwards grabbed Mr. Ginn's arm and attempted to pull him up, but he pulled away. Kirkland grabbed Mr. Ginn's left arm and Edwards grabbed Mr. Ginn's right arm. Edwards applied an arm bar hold, forcing Mr. Ginn to lean forward. This allowed Kirkland and Edwards to bring Mr. Ginn's arms behind his back and Edwards placed handcuffs on Mr. Ginn's wrists. According to Carlson's and Fisher's affidavits, the deputies picked Mr. Ginn up and dragged him to the patrol car. Affidavit of Teresa Carlson, ¶ 17, Affidavit of Misty Fisher, ¶ 19. During this time, Mr. Ginn grumbled in a tone of frustration that he should not have been arrested.

At the patrol unit, Kirkland patted Mr. Ginn down and placed him in the back seat of the patrol car. Edwards asked Mr. Ginn how much he had to

drink and he refused to answer. Edwards asked Mr. Ginn if he had consumed anything other than alcohol and he said that he had not. Edwards completed the arrest affidavit and gave it to Kirkland. According to the arrest affidavit, Mr. Ginn was "unable to stand, had slurred speech and smelled of an odor commonly associated with an alcoholic [b]everage." Exhibit 1 to Plaintiff's Exhibit B.

According to Carlson's affidavit, the three deputies talked for several minutes. She saw Mr. Ginn slumped over in the back seat of the car and she was concerned that he had passed out. Affidavit of Teresa Carlson, ¶ 18.

Kirkland transported Mr. Ginn to the Cleveland County Detention Center ("CCDC") on the charge of public intoxication. Kirkland's drive took approximately fifteen to twenty minutes. As Kirkland drove, Mr. Ginn was awake, sitting upright in the back seat. Mr. Ginn complained of his handcuffs being too tight. Mr. Ginn did not appear to be injured and did not ask for any medical assistance. Kirkland suggested that he lie down in the seat because that might relieve pressure to his wrists. Approximately two or three minutes away from CCDC, Kirkland noticed Mr. Ginn had laid down in the backseat. Mr. Ginn was not making any noise and Kirkland thought Mr. Ginn had "passed out, like most of your drunks do." Deposition of Gilbert Kirkland, p. 19, ll. 15-16. When Kirkland arrived at the CCDC, defendants Kevin Brandon ("Brandon") and David Epps ("Epps"), who were jailers, opened the back door of the patrol car.

Mr. Ginn was leaning partially against the other door. He was awake. Brandon felt that if they attempted to take Mr. Ginn out by that door, they would run the risk of him falling and injuring himself. Brandon and Epps took Mr. Ginn by his feet to pull him to the open door. Mr. Ginn grumbled in a tone of frustration about being arrested and tried to kick Brandon. Brandon told Mr. Ginn to calm down. Mr. Ginn was then cooperative. Brandon and Epps then pulled Mr. Ginn by his feet far enough to the open door that he could stand up. Brandon held onto Mr. Ginn's arm with both hands and Epps had Mr. Ginn's other arm. Kirkland was following behind. As they were going to the jail, Epps asked Mr. Ginn if he was ok, and he responded "Yeah" in a slurred and grumpy manner. While going to the jail, Mr. Ginn stumbled and he dragged his feet once or twice and Brandon and Epps had to assist Mr. Ginn back up on his feet. According to Brandon, it would take a momentary exertion to get Mr. Ginn back up on his feet and Brandon considered himself at that point to be carrying Mr. Ginn. Also, according to Brandon, Mr. Ginn was sweating. Plaintiffs' Exhibit D, p. 16, l. 10.[4]

Based upon Mr. Ginn's appearance, behavior and level of intoxication, Brandon and Epps believed that

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[4] The court has viewed the DVD exhibit (Exhibit 1 to Defendants' Exhibit E), reflecting Mr. Ginn's arrival at the reception area of the CCDC. He was obviously intoxicated and needed assistance in walking, but did not need to be carried by Brandon and Epps.

Mr. Ginn would be unable to answer routine booking questions. He had responded to questions or directions with a grunt or mumble. According to Kirkland, Mr. Ginn, in answer to questions, "would ignore you or go off on something else completely different." Plaintiffs' Exhibit A, p. 25, ll. 3-4. So upon entering the CCDC with Mr. Ginn, with Kirkland following, Brandon and Epps took Mr. Ginn down the hallway to receiving cell 102, prior to formally processing him into the CCDC.

There were six receiving cells on the first floor of the CCDC. Each contained a concrete bench, a toilet and a sink. Generally, the receiving cell housed detainees on a short-term basis.

It was not uncommon for an intoxicated person to be taken directly to a receiving cell before being formally processed into the CCDC. This occurred when an intoxicated person was unable, due to his intoxication, to answer routine questions asked during processing, such as personal history, family contact numbers and medical information. The intoxicated person would be placed in the receiving cell for up to four hours to allow him to sober up enough to answer the routine questions.

Once Mr. Ginn was placed in receiving cell 102, Brandon and Epps, for safety reasons, put Mr. Ginn on his knees in front of the concrete bench in order to take off the handcuffs. Mr. Ginn's chest was resting on the bench. When Brandon and Epps took the handcuffs off, Mr. Ginn put his arms underneath his

head, and Brandon, Epps and Kirkland, walked out. Mr. Ginn did not say anything at that time.

After Kirkland exited receiving cell 102, he completed his paperwork, left the CCDC and returned to his duties in patrolling Cleveland County.

At approximately 9:35 p.m., Brandon conducted a sight check of the receiving cells. He looked into receiving cell 102 and initially believed Mr. Ginn was sleeping in a kneeling position. He opened the door to get a verbal response from Mr. Ginn. Twice, Brandon asked out loud, "Are you okay, sir?" Mr. Ginn did not respond either time, so Brandon approached Mr. Ginn with the intent to nudge him awake.

As Brandon approached Mr. Ginn, he noticed that Mr. Ginn appeared to have a bluish tone on his face. Brandon immediately called for backup and deputies, Charles Carter ("Carter") and James Bullard ("Bullard") responded. They checked Mr. Ginn's vital signs. Mr. Ginn was cold to the touch and the deputies were unable to detect a pulse or breath. They moved Mr. Ginn from his kneeling position onto the ground and on his back in a prone position so that they could attempt life saving procedures. Carter and Bullard initiated the automatic defibrillator on Mr. Ginn. While they did this, Brandon notified dispatch to call for an ambulance. The defibrillator did not appear to deliver a shock to Mr. Ginn; a defibrillator can only deliver an electric shock if it in fact detects a heart rhythm in the patient.

Brandon contacted Lieutenant Rhonda Peterson and explained the situation. She instructed him to secure the scene, call for field duties, and start a log, which he did. Then, Norman Fire Department personnel arrived at the CCDC, followed immediately by Emergency Medical Services personnel. Brandon met these responders and escorted them to receiving cell 102. When they arrived, they observed Mr. Ginn and stated that there was nothing that could be done for him.

From the time Mr. Ginn was brought into the CCDC until he was found unconscious in his cell, Brandon and Epps were the two detention officers roaming the first floor of the CCDC. One of their job duties that evening included conducting sight checks of all persons housed on the first floor of the CCDC. Neither Brandon nor Epps specifically recall conducting a sight check on Mr. Ginn, but Brandon believes he saw Mr. Ginn one time before 9:35 p.m. Brandon states that he looked in the cell and Mr. Ginn appeared to be sleeping. If a sight check is done, it is supposed to be logged in CCDC's computer. There was no record in the CCDC computer of any sight checks on Mr. Ginn.

Epps, who would have been responsible for booking Mr. Ginn into CCDC, would have been responsible for conducting a medical screening on Mr. Ginn. Epps never conducted a medical screening because he did not believe Mr. Ginn was fully capable of cooperating. Epps made no attempt to do a medical screening in

the approximate three hour period before Mr. Ginn was found dead.

Epps and Brandon were not informed by Kirkland that Mr. Ginn had consumed a bottle of whiskey prior to his arrest. No inquiry was made about how much alcohol had been consumed. Epps and Brandon did not know Mr. Ginn's blood alcohol level.

Mr. Ginn was not required to submit to an [sic] breathalyzer or blood alcohol test because he was arrested for public intoxication. It was the policy of the CCDC not to offer a person arrested for public intoxication a breathalyzer or blood alcohol test because under Oklahoma law, evidence of the alcohol concentration of a person's breath or blood is not required to arrest or charge that person for public intoxication.

Chai Choi, M.D. conducted the autopsy of Mr. Ginn. Dr. Choi concluded that Mr. Ginn died of "acute coronary syndrome to occlusive atherosclerotic coronary artery disease" and that "[a]cute ethanol intoxication would be a contributory factor to his death." Defendant's Exhibit I. Dr. Choi also stated in the report that Mr. Ginn's blood alcohol level was .32%. She did not have an opinion as to whether he would have experienced the same heart attack without acute ethanol intoxication. Defendant's Exhibit H, Answer No. 5.

DeWayne Beggs ("Beggs"), Sheriff of Cleveland County, was not present at Mr. Ginn's arrest or when

he was placed in the receiving cell at the CCDC. Beggs testified that he was aware that people can die from drinking too much alcohol. He also testified that individuals were often arrested for public intoxication. He was unaware of any specific training regarding alcohol toxicity, other than breathalyzer training, that was provided to any of his deputies. He also testified that he did not provide or require any training regarding how to determine whether an individual who has an excessive amount of alcohol needs medical supervision. According to Beggs, a deputy was not authorized to perform a breathalyzer test for an individual who was arrested for public intoxication because Oklahoma law did not require that test for the prosecution of public intoxication cases. Beggs testified that breathalyzer tests were never administered to individuals arrested for public intoxication. Plaintiff's Exhibit G, p. 10, l. 6; p. 23, l. 15.

The manual for CCDC provides in pertinent part as follows:

> Any inmate who is charged with being under the influence of alcohol or drugs or who has alcohol on his breath at the time of booking should be considered as a possible alcoholic. Inmates requiring detoxification or booked on drug charges will be placed in a holding cell for 4 to 6 hours or until sober and observed a minimum of every 30 minutes.
>
> * * *

> The booking deputy will ask the arresting officer about blood alcohol level of the inmate which would mean referral elsewhere based on a high blood alcohol level. If the blood alcohol level is .30 or more the inmate will not be accepted. If the inmate is unconscious, he will not be accepted.
>
> If an inmate is booked into the facility under borderline conditions the Shift Supervisor will ensure that the inmate is checked at least every fifteen minutes.

Plaintiff's Exhibit L, at p. 3.

Beggs testified that the portion of the policy requiring the booking deputy to ask the arresting officer about the blood alcohol level of the inmate applied only to DUI. Beggs also testified that if Mr. Ginn had been arrested for DUI with a blood alcohol level of .32, he would not have been admitted into the CCDC.

In the opinion of plaintiffs' expert, Dr. Kenneth B. Desser, Mr. Ginn died as a result of severe ischemic heart disease, compounded by a toxic alcohol level and ventricular hypertrophy. Dr. Desser also opined that if Mr. Ginn had been transported to a medical facility, Mr. Ginn's blood alcohol level would have been measured exceeding 300 mg/dl and that the following would have occurred: Mr. Ginn would have been kept for observation; would have experienced an acute coronary syndrome and ventricular arrhythmia; the arrhythmia would have been successfully reversed; and after successful treatment,

Mr. Ginn would have undergone cardiac catheterization and coronary angiography which would have resulted in either coronary bypass surgery or percutaneous coronary intervention. Dr. Desser further opines that Mr. Ginn's death was preventable. Plaintiff's Exhibit O, at p. 3.[5]

*Discussion*

I. *Individual Capacity Claims*

Plaintiffs allege that defendants violated Mr. Ginn's constitutional rights by acting with deliberate indifference to Mr. Ginn's serious medical needs. Defendants contend that their actions did not amount to a violation of Mr. Ginn's constitutional rights. They argue that they are entitled to qualified immunity as to plaintiffs' claims.

The doctrine of qualified immunity shields government officials from liability based on their discretionary acts. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The doctrine thus gives government officials the freedom to perform their official duties without fear that even a slight misstep will trigger their financial ruin. *Hollenbaugh v. Maurer,* 397 F.Supp.2d 894, 902 (N.D.Ohio 2005) (citing *Wyatt v.* Cole, 504 U.S. 158,

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[5] Dr. Desser's expert opinions are subject to a pending motion to exclude based upon *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), which the court does not address in this order.

167, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992)). Nevertheless, government officials lose qualified immunity when they "violate clearly established statutory of constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818.

The Tenth Circuit has established a two-part inquiry for evaluation of claims of qualified immunity in the summary judgment context:

> First, the plaintiff must establish the defendant violated a constitutional right. If no constitutional violation is established by the plaintiff's allegations or the record, our inquiry ends. But if a constitutional right was violated, we next ask if the constitutional right was clearly established. To be clearly established, either Supreme Court or Tenth Circuit precedent must be on point or the clearly established weight of authority from other courts must agree with plaintiff's contention.

*Estate of Larsen ex rel Sturdivan v. Murr,* ___ F.3d ___, 2008 WL 40020 *2 (10th Cir. Jan.2, 2008) (citing *Cortez v. McCauley,* 478 F.3d 1108, 1114-1115 (10th Cir.2007)). Consequently, in analyzing plaintiffs' § 1983 claims, the court must decide whether plaintiffs have proffered sufficient evidence of a constitutional violation. If so, the court must decide whether the violation was clearly established. "Under the Fourteenth Amendment's due process clause, pretrial detainees, like [Mr. Ginn], are entitled to the same degree of protection regarding medical

attention as that afforded convicted inmates under the Eighth Amendment." *Frohmader v. Wayne,* 958 F.2d 1024, 1028 (10th Cir.1992). This is because "[a]n individual incarcerated, whether for a term of life for the commission of some heinous crime, or merely for the night to 'dry out' in the local drunk tank, becomes both vulnerable *and* dependent upon the state to provide certain simple and basic human needs." *Fitzke v. Shappell,* 468 F.2d 1072, 1076 (6th Cir.1972) (emphasis in original). Thus, plaintiffs' claim must be judged against the "deliberate indifference to serious medical needs" test of *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). But because "society does not expect that prisoners will have unqualified access to health care," *Hudson v. McMillian,* 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), it must be borne in mind that "deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" *Id.* (citing *Estelle*).

"Deliberate indifference" involves both an objective and a subjective component. *Olsen v. Layton Hills Mall,* 312 F.3d 1304, 1315 (10th Cir.2002). The objective component is met if the deprivation is "sufficiently serious." *Sealock v. Colorado,* 218 F.3d 1205, 1209 (10th Cir.2000). A medical need is sufficiently serious "if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Mata v. Saiz,* 427 F.3d 745, 751 (10th Cir.2005). A medical need can

be sufficiently serious based either on the ultimate harm or "the symptoms presented at the time the [arresting or jail officer] has contact with the [detainee]." *Mata v. Saiz,* 427 F.3d at 753. The subjective component is met if an arresting or jail officer "knows of and disregards an excessive risk to [a detainee's] health or safety." *Farmers v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Essentially, the arresting or jail officer must be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Olsen,* 312 F.3d at 1315 (quotations omitted). An arresting or jail officer's knowledge of a substantial risk may be inferred from circumstantial evidence. *Farmers,* 511 U.S. at 842. A fact finder may conclude that an arresting or jail officer knew of a substantial risk "from the very fact that the risk was obvious." *Id.*

A. *Arresting Officers – Edwards and Kirkland*

Viewing the facts and evidence in a light most favorable to plaintiffs, the court concludes that plaintiff have failed to proffer sufficient evidence to create a genuine issue of material fact as to the objective component of deliberate indifference based upon Mr. Ginn's symptoms or condition at the time of his arrest and transport to CCDC. Mr. Ginn's condition was not diagnosed by a physician as mandating treatment. As to Edwards, the record, read favorably to the plaintiff, shows that he knew Mr. Ginn had reportedly consumed an entire bottle of

whiskey but also knew Mr. Ginn was an alcoholic; he knew that Mr. Ginn had fallen to the ground through the unfinished portion of the front porch, that he might have hit his head, "that he appeared to be knocked out for a short time," Plaintiff's Exhibit C, ¶ 13, and that he "had been talking as if he was seeing someone," Plaintiff's Exhibit J, ¶ 17, had slurred speech, was unable to stand and could not walk on his own to the patrol car. Kirkland knew Mr. Ginn had consumed an entire bottle of whiskey but also knew Mr. Ginn was an alcoholic, he knew that Mr. Ginn had fallen to the ground through the unfinished portion of the front porch, may have hit his head and appeared to have been knocked out for a short time, he thought Mr. Ginn "had passed out" in the patrol car shortly before arriving at CCDC, he knew Mr. Ginn was unable to walk into the CCDC without assistance, had bloodshot eyes, had slurred speech, and in response to a question "would ignore you or go off on something else completely different." Plaintiffs' Exhibit A, p. 25, ll. 3-4. However, during Edwards and Kirkland's encounter with Mr. Ginn, he was conscious and exhibited no signs of pain or distress. He never verbalized that he was sick. While Kirkland thought Mr. Ginn had passed out on the way to CCDC, Mr. Ginn was awake when he entered CCDC and when Kirkland left Mr. Ginn's cell. Although plaintiffs have proffered Carlson's affidavit wherein she testifies that she does not believe Mr. Ginn answered when one of the deputies asked him if he wanted to go to the hospital, plaintiffs do not dispute Kirkland's affidavit testimony that Mr. Ginn,

when initially encountered by Kirkland, told Kirkland that he was alright. Mr. Ginn exhibited no external injuries.[6] He was not vomiting, choking or having any trouble breathing. There is no evidence of agitation or nervousness. Mr. Ginn was aware that he was being arrested. There is no evidence that from these defendants' perspective, Mr. Ginn acted differently from other persons defendants encountered or arrested in an intoxicated state. While the medical examiner found Mr. Ginn's alcohol blood level to be .32, it is undisputed that defendants were not aware of Mr. Ginn's blood alcohol level at the time of arrest and transport to CCDC. Under Oklahoma law, law enforcement agencies are not required to administer blood and breath tests, even at a defendant's request, prior to arresting a defendant for public intoxication. *Findlay v. City of Tulsa,* 561 P.2d 980 (Okl.Cr.1977). Moreover, the circumstances of Mr. Ginn's arrest did not fulfil [sic] the conditions for applying Oklahoma's implied consent statute. *See,* 47 O.S.2001, § 751. The court concludes that the facts presented are not

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[6] In their affidavits, Carlson and Fisher testify that while trying to handcuff Mr. Ginn, one of the deputies slammed Mr. Ginn's head on the porch hard enough for Mr. Ginn's head to bleed. The medical examiner's report, although revealing contusions, marks, scars and abrasions on Mr. Ginn's body, makes no reference to any contusion, mark, scar or abrasion on his head. Plaintiffs' Exhibit I. The court, even viewing the evidence in a light most favorable to plaintiffs, can only conclude that the wound to Mr. Ginn was superficial. The court further notes that plaintiffs have not alleged an excessive force claim in this action.

sufficient for a reasonable jury to conclude that Mr. Ginn's symptoms or condition, at the time of arrest and transport to the CCDC, were "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Mata,* 427 F.3d at 753. The court therefore concludes that plaintiffs have not satisfied the objective component of the deliberate indifference test based upon Mr. Ginn's symptoms or condition at the time of his arrest and transport to CCDC.

In addition to Mr. Ginn's intoxicated condition, plaintiffs rely upon the ultimate harm to Mr. Ginn, that is, his heart attack and death, to support their deliberate indifference to serious medical need claim. The court concludes that the ultimate harm to Mr. Ginn, that is, his heart attack and death, were, without doubt, sufficiently serious to meet the objective component. *See, Mata,* 427 F.3d at 745 (heart attack sufficiently serious to satisfy the objective prong). The court therefore turns to the subjective component of the deliberate indifference test.

Viewing the facts and evidence in a light most favorable to plaintiffs, the court concludes that the record is insufficient to raise a genuine issue of material fact as to whether defendants Edwards and Kirkland knew of and disregarded an excessive risk to Mr. Ginn's health and safety. There is insufficient evidence in the record of facts from which an inference could be drawn that a substantial risk of heart attack and death existed and that defendants drew that inference. Although defendants knew Mr.

Ginn was intoxicated, had fallen, may have hit his head and appeared (to persons at the scene when they arrived) to have been knocked out for a short time, was unable to stand and walk without assistance, and Kirkland thought Mr. Ginn "had passed out" in the patrol car shortly before arriving at CCDC and knew that Mr. Ginn was unable to walk into the CCDC without assistance, and in response to a question "would ignore you or go off on something else completely different," the court concludes that this evidence does not raise a genuine issue of material fact that defendants knew that a substantial risk of serious harm existed. As stated, defendants did not know Mr. Ginn's blood alcohol level. There was no Oklahoma statutory or case authority permitting or requiring a breath or blood test to be administered to Mr. Ginn, as a public intoxication arrestee. In addition, there is no evidence in the record of any symptoms or signs indicating that Mr. Ginn would suffer from a heart attack. Again, there is no evidence in the record that Mr. Ginn was in any pain or distress. During defendants' encounter with Mr. Ginn, he was conscious and understood he was being arrested. There is no evidence in the record which would permit a reasonable jury to conclude that a substantial risk of heart attack was obvious. The court concludes that the evidence in the record is insufficient to show that defendants were aware that Mr. Ginn faced a substantial risk of a heart attack and required medical attention.

Plaintiffs have presented evidence from their expert, Dr. Desser, by way of affidavit, that in his opinion "Mr. Ginn[ ] should have been transported to a medical facility after he was taken into custody by law enforcement officers." Plaintiffs' Exhibit O, p. 3. In addition, plaintiffs have argued that Kirkland should have informed Brandon and Epps of how much alcohol Mr. Ginn had consumed and the fact that Mr. Ginn had fallen, may have been seeing people and may have passed out. However, the court concludes that this evidence is not sufficient to create a genuine issue of material fact as to the subjective component of the deliberate indifference claim. Liability cannot be based on negligence or even gross negligence. *Barrie v. Grand County, Utah,* 119 F.3d 862, 869 (10th Cir.1997). Rather, plaintiffs must show that defendants exhibited deliberate indifference to Mr. Ginn's known and serious medical needs. Dr. Desser's affidavit testimony and Kirkland's omissions of details occurring during Mr. Ginn's arrest and transport fail to provide such evidence. The deputies at the scene were dealing with a man who was obviously intoxicated. He was belligerent. He had clearly worn out his welcome at Teresa Carlson's trailer, and she wanted him out of there. Plaintiff's Exhibit C, ¶¶ 2-11. The deputies were neither physicians nor social workers; they were not obliged by § 1983 jurisprudence to provide the services that might have been considered to be optimal by practitioners of those professions.

Because plaintiffs have failed to proffer evidence sufficient to raise a genuine issue of material fact as to the subjective component of the deliberate indifference to medical needs claim, the court concludes that plaintiffs have failed to satisfy the first prong of the qualified immunity analysis in the summary judgment context. The court concludes that defendants Edwards and Kirkland are entitled to summary judgment on plaintiffs' § 1983 claim.

B. *Jail Officers – Brandon and Epps*

Viewing the facts and evidence in a light most favorable to plaintiffs, the court concludes that plaintiffs have failed to present evidence sufficient to create a genuine issue of material fact on the objective component of deliberate indifference based upon Mr. Ginn's symptoms or condition when he arrived at CCDC. Mr. Ginn's symptoms or condition had not been diagnosed by a physician as mandating treatment. While Mr. Ginn was intoxicated, unable to walk on his own, responded to questions with a grunt or a mumble and was sweating, the court concludes that his condition was not one that a reasonable jury could find was "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Mata,* 427 F.3d at 753. Although the medical examiner found Mr. Ginn's blood alcohol level to be .32, it is undisputed that defendants did not know Mr. Ginn's blood alcohol level. There is nothing in the record to show that from these defendants' perspective, Mr. Ginn's symptoms or condition

distinguished him from alcohol abusers that defendants dealt with on a daily basis. There is no evidence in the record of any complaints from Mr. Ginn of any pain or distress. There were no external injuries. He was not vomiting or choking. When defendants left the cell, Mr. Ginn was conscious. The court concludes that Mr. Ginn's symptoms upon arrival at CCDC were not sufficiently serious to satisfy the objective component of deliberate indifference standard.

Plaintiffs rely upon Mr. Ginn's heart attack and death, in addition to his intoxicated condition, to support their claim. The court concludes that the ultimate harm to Mr. Ginn, that is, his heart attack and death, was, without doubt, sufficiently serious to meet the objective component. *See, Mata,* 427 F.3d at 745 (heart attack sufficiently serious to satisfy the objective prong). Accordingly, the court turns to the subjective component of the deliberate indifference test.

Viewing the facts and evidence in a light most favorable to plaintiffs, the court concludes that the record is insufficient to raise a genuine issue of material fact as to whether defendants Brandon and Epps knew of and disregarded an excessive risk to Mr. Ginn's health and safety. There is insufficient evidence in the record of facts from which an inference could be drawn that a substantial risk of harm existed and that defendants drew that inference. Although defendants knew Mr. Ginn was intoxicated, unable to walk on his own, unable to

respond to questions without grunting or mumbling and sweating, the court concludes that this evidence does not raise a genuine issue of material fact that defendants knew that a substantial risk of serious harm existed. As stated, defendants did not know Mr. Ginn's blood alcohol level. They did not know how much alcohol he had consumed. Moreover, there is no evidence in the record of any symptoms or signs Mr. Ginn would suffer a heart attack. Again, there is no evidence in the record that Mr. Ginn was in any pain or distress. During defendants' encounter with Mr. Ginn, he was conscious and at least somewhat responsive. There is no evidence in the record from which a reasonable jury could conclude that a substantial risk of heart attack was obvious upon Mr. Ginn's arrival at the CCDC.[7] The court concludes that

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[7] In this respect, Judge Tacha's opinion for the Court of Appeals in *Hocker v. Walsh*, 22 F.3d 995 (10th Cir.1994) is apposite. In *Hocker*, plaintiff's decedent was brought to the jail in an intoxicated condition, and then hung herself in her jail cell. She was too intoxicated to be processed into the jail when she arrived there, *id.* at 997, and still could not be processed five hours after she arrived, *id.*, but it was not apparent that she was suicidal. In affirming summary judgment, Judge Tacha wrote for the court that "[t]hough the staff obviously knew that Ms. Hocker was intoxicated or under the influence of drugs, intoxication with its accompanying incoherence does not, by itself, give the Detention Center staff knowledge that Ms. Hocker posed a specific risk of suicide." *Id.* at 1000.Intoxication, at least in a 49 year-old man like Mr. Ginn, would seem to be even less likely to portend a heart attack. *Compare, Hutto v. Davis*, 972 F.Supp. 1372 (W.D.Okla.1997) (summary judgment denied where defendants "did nothing while [detainee] [illegible]y

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the evidence in the record is insufficient to show that defendants were aware that Mr. Ginn faced a substantial risk of a heart attack and required medical attention.

In support of the subjective element, plaintiffs point to evidence that defendants, Brandon and Epps, failed to provide Mr. Ginn with a medical screening and failed to monitor him in accordance with the CCDC detention manual. Although defendants object to the admissibility of this evidence as irrelevant and a potential cause for jury confusion, the court need not decide the admissibility issue for purposes of summary judgment. The court concludes that even if the evidence were admissible, this evidence is not sufficient to create a genuine issue of material fact as to the subjective component of the claim asserting deliberate indifference to serious medical needs. The court concludes that defendants' failure to provide Mr. Ginn with a medical screening upon entry into the CCDC[8] and failure to monitor while at the CCDC, under the circumstances of this case, establishes, at most, negligence or gross negligence. Deliberate indifference is a very high standard, a showing of negligence and even gross negligence will not suffice.

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convulsing on the floor of his jail cell while other inmates repeatedly called for help." *Id.* at 1378).

[8] The court notes that plaintiffs have not provided any evidence that performance of the medical screening would have revealed that Mr. Ginn had a .32 alcohol blood level or that he was at risk for a serious heart attack.

*Barrie,* 119 F.3d at 869. The court concludes that this evidence along with the other evidence in the record as to defendants' encounter with Mr. Ginn is insufficient to raise a genuine issue of material fact that defendants knew Mr. Ginn faced a substantial risk of serious harm and needed medical attention.

As plaintiffs have failed to proffer evidence sufficient to raise a genuine issue of material fact as to the subjective component of the deliberate indifference to medical needs claim, the court concludes that plaintiffs have failed to satisfy the first prong of the qualified immunity analysis in the summary judgment context. The court concludes that defendants Brandon and Epps are entitled to summary judgment on plaintiffs' § 1983 claim.

C. *Sheriff-**Beggs***

Plaintiffs also bring suit against Sheriff **Beggs**, in his individual capacity. In the Second Amended Complaint, plaintiffs do not allege that this defendant was directly involved in the events of Mr. Ginn's arrest and detention. Instead, they allege that defendant **Beggs** failed to properly train and supervise Edwards and Kirkland, the arresting officers, and Brandon and Epps, the jail personnel, to ensure that persons in their custody received necessary medical care.

Because plaintiffs are seeking to impose § 1983 liability on defendant Beggs based on inadequate supervision and training, plaintiffs must show both

that one or more of his employees acted with deliberate indifference to Mr. Ginn's serious medical needs, and that there is "'an affirmative link between the constitutional violation and the supervisor's own actions, or failure to supervise.'" *Mee v. Ortega,* 967 F.2d 423, 431 (10th Cir.1992) (quoting *Meade v. Grubbs,* 841 F.2d 1512, 1527 (10th Cir.1988)). Here, the court has found insufficient evidence that defendant's subordinates acted with deliberate indifference to Mr. Ginn's serious medical needs and therefore has found no constitutional violation on the part of defendant's subordinates. Because there was no constitutional violation by the subordinates, there is no constitutional violation which can be affirmatively linked to this defendant's own actions or failure to supervise. The court therefore concludes that plaintiffs cannot succeed on their claim against defendant **Beggs**, in his individual capacity. *See, Graves v. Thomas,* 450 F.3d 1215, 1225 (10th Cir.2006); *Hinton v. City of Elwood, Kan.,* 997 F.2d 774, 783 (10th Cir.1993). Accordingly, the court concludes that defendant **Beggs**, in his individual capacity, is entitled to summary judgment on plaintiffs' § 1983 claim.

II. *Official Capacity Claims*

Plaintiffs also allege a failure to train claim against defendants, DeWayne **Beggs**, Tommy Edwards, Gilbert Kirkland, Kevin Brandon and David Epps, in their official capacities. Plaintiffs' claims against defendants are the equivalent of a claim against

Cleveland County. *Lopez v. LeMaster*, 172 F.3d 756, 762 (10th Cir.1999). Having concluded that Mr. Ginn's constitutional rights were not violated, the claim against Cleveland County likewise fails. The Tenth Circuit has concluded that even if the municipality's policies, training, and supervision are unconstitutional, the municipality cannot be held liable under § 1983 in the absence of a constitutional violation by any of its officers. *Trigalet v. City of Tulsa,* 239 F.3d 1150, 1155-1156 (10th Cir.), *cert denied,* 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001); *see also, Estate of Larsen ex rel. Sturdivan v. Murr,* ___ F.3d, ___, 2008 WL 40020, (10th Cir. Jan. 2, 2008) (plaintiff cannot proceed on failure to train or supervise claim in an excessive force case since no constitutional violation occurred). Therefore, the court concludes that defendants Beggs, Edwards, Kirkland, Brandon and Epps, in their official capacities, are entitled to summary judgment as to plaintiffs' § 1983 claims.[9]

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[9] In their briefing, plaintiffs, citing to *Garcia v. Salt Lake County,* 768 F.2d 303 (10th Cir.1985) and cases from other jurisdictions citing *Garcia,* contend that defendant Beggs, in his official capacity, may be held liable even though the individual defendants are not held liable. In *Garcia,* the Tenth Circuit concluded that "[a]lthough the acts or omissions of no one employee may violate an individual's constitutional rights, the combined act or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." *Id.* at 310. The court, however, finds *Garcia* as well as the other cases cited, to be distinguishable from this case. Moreover, the court concludes that plaintiffs have

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III. *State Law Claims*

Plaintiffs assert negligence claims against defendant, Board of County Commissioners of Cleveland County, based upon the failure of defendants Edwards and Kirkland to take Mr. Ginn to the hospital instead of to the CCDC, and defendant Beggs' alleged failure to properly manage and supervise defendants Edwards and Kirkland. Having concluded that summary judgment is appropriate on all § 1983 claims alleged by plaintiffs, the court must determine whether to exercise supplemental jurisdiction over plaintiffs' state law claims of negligence. Judicial economy, fairness, convenience and comity are all considerations that are to guide a district court's decision whether to defer to a state court rather than retaining and disposing of state law claims. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726-727, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). However, the Tenth Circuit has held that when federal claims are resolved before trial, the district court should usually decline to exercise jurisdiction over the state law claims and allow the plaintiff to pursue them in state court. *See, Smith v. City of Enid By and Through Enid City Com'n,* 149 F.3d 1151, 1156 (10th Cir.1998); *Ball v. Renner,* 54 F.3d 664, 669 (10th Cir.1995). Having disposed of the federal law

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not raised a genuine issue of material fact that the combined acts or omissions of Kirkland, Edwards, Brandon and Epps, acting pursuant to the county's policy or custom, violated Mr. Ginn's constitutional rights.

claims prior to trial and finding no consideration requiring the court to retain and dispose of plaintiffs' state law claims, the court, in its discretion and pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over plaintiffs' state law claims. The court shall thus dismiss the state law claims without prejudice.

*Conclusion*

Based upon the foregoing, Defendants' Motion for Summary Judgment, filed November 1, 2007 (doc. no. 48) is **GRANTED** to the extent that defendants seek summary judgment on plaintiffs' 42 U.S.C. § 1983 claims. As to the remaining state law claims, the court, in its discretion and pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over the state law claims and **DISMISSES WITHOUT PREJUDICE** the state law claims. Judgment shall be entered forthwith.

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37

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No. 09-87

FILED
AUG 24 2009
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In The

# Supreme Court of the United States

GINGER MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn,

*Petitioner,*

v.

DeWAYNE BEGGS, as Sheriff of Cleveland County; DAVID EPPS; KEVIN BRANDON; CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS; TOMMY EDWARDS; GILBERT KIRKLAND,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the County can be held liable under 42 U.S.C. § 1983 when there has been no underlying violation of the United States Constitution by its officers.

2. Whether the County Officers and the County were deliberately indifferent to Decedent's serious medical needs when he was arrested, and then booked into the County jail, and then later died of a heart attack.

3. Whether the County Officers and the County had notice that Decedent had a serious medical need, whether an inference could be drawn that a substantial risk of serious harm existed and whether they actually drew the inference.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

COUNTER-STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE PETITION ..... 3

I. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEAL WITH REGARD TO THE REQUIREMENT THAT THERE BE AN UNDERLYING CONSTITUTIONAL VIOLATION BEFORE A COUNTY OR MUNICIPALITY CAN BE HELD LIABLE UNDER 42 U.S.C. § 1983 .. 3

II. THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE COUNTY OFFICERS AND THE COUNTY; THERE WAS NO DELIBERATE INDIFFERENCE TO ANY SERIOUS MEDICAL NEED INVOLVING DECEDENT GINN.... 8

CONCLUSION ..... 16

# TABLE OF AUTHORITIES

Page

CASES

*Adams v. Auburn Hills*, 336 F.3d 515 (6th Cir. 2003) ..... 6

*Bukowsky v. City of Akron*, 326 F.3d 702 (6th Cir. 2003) ..... 7

*Cagle v. Sutherland*, 334 F.3d 980 (11th Cir. 2003) ..... 6

*Camuglia v. City of Albuquerque*, 448 F.3d 1214 (10th Cir. 2006) ..... 6

*Case v. Eslinger*, 555 F.3d 1317 (11th Cir. 2009) ..... 4

*City of Los Angeles v. Heller*, 475 U.S. 796 (1986) ..... 4

*Cook ex rel. Tessier v. Sheriff of Monroe County*, 402 F.3d 1092 (11th Cir. 2005) ..... 6

*Estate of Hocker v. Walsh*, 22 F.3d 995 (10th Cir. 1994) ..... 10

*Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255 (10th Cir. 2008) ..... 5

*Farmer v. Brennan*, 511 U.S. 825 (1994) ..... 9, 10

*Findlay v. City of Tulsa*, 561 P.2d 980 (Okla. Crim. App. 1997) ..... 14

*Graves v. Thomas*, 450 F.3d 1215 (10th Cir. 2006) ..... 6

*Hall v. County of Nemaha*, 509 F. Supp. 2d 821 (D. Neb. 2007) ..... 11

TABLE OF AUTHORITIES – Continued

Page

*Hines v. Henson*, 293 Fed. Appx. 261 (5th Cir. 2008) ..... 10

*Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007) ..... 5

*Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004) ..... 6

*Kiser v. City of Huron*, 219 F.3d 814 (8th Cir. 2000) ..... 7

*Livsey v. Salt Lake County*, 275 F.3d 952 (10th Cir. 2001) ..... 7

*Long v. City and County of Honolulu*, 511 F.3d 901 (9th Cir. 2007) ..... 5

*Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009) ..... *passim*

*Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007) ..... 5

*Patrick v. Lewis*, 397 F. Supp. 2d 1134 (D. Minn. 2005) ..... 11

*Proffitt v. Ridgway*, 279 F.3d 503 (7th Cir. 2002) ..... 7

*Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000) ..... 7

*Segal v. City of New York*, 459 F.3d 207 (2d Cir. 2006) ..... 5

*Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001) ..... 7

*Woodward v. Correctional Medical Services*, 368 F.3d 917 (7th Cir. 2004) ..... 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 .....*passim*

OKLAHOMA STATUTES

Okla. Stat. tit. 47, §§ 751-754 .....14

Okla. Stat. tit. 51, §§ 151-172 .....1, 3

## COUNTER-STATEMENT OF THE CASE

Petitioner Martinez, individually and on behalf of the estate of her father, brought this lawsuit under 42 U.S.C. § 1983, and the Oklahoma Governmental Tort Claim Act, Okla. Stat. tit. 51, §§ 151-172, against Respondents DeWayne Beggs, Sheriff of Cleveland County, Kevin Brandon, David Epps, James Bullard, Tommy Edwards, and Gilbert Kirkland ("County Officers"), and the Board of County Commissioners of Cleveland County ("County"), regarding the death of Kenneth Wayne Ginn ("Ginn") in the Cleveland County Detention Center ("CCDC").

Ginn was arrested on the charge of public intoxication and placed in the CCDC on May 2, 2006. Aplt. App. at 101.[1] Ginn was 49 years old at the time of his death. When Ginn was arrested, even though he did not appear to be injured in any way, Kirkland, the first deputy on the scene offered him medical assistance, but Ginn declined his offer. Aplt. App. at 92; 101. At the time of his arrest and incarceration, Ginn appeared to be intoxicated, was belligerent and combative with the deputies, did not appear to be injured, recognized persons around him, and he was able to walk. Aplt. App. at 92; 101; 108. Although intoxicated, Ginn was cognizant of his surroundings and his circumstances, and was argumentative with

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[1] Aplt. App. at ___, refers to the record filed in United States Court of Appeals in this case.

the deputies regarding the fact that he had been arrested. Aplt. App. at 93; 108-109.

Ginn was taken by Kirkland to the CCDC. Aplt. App. at 93-94. After his arrival at the CCDC, Ginn was able to walk into the building with the assistance of jailers. Ginn never complained to Kirkland of any injury or illness, and he did not appear at any time to be injured or ill. Aplt. App. at 92; 94; 96; 101.

When Ginn was placed in his cell at the CCDC, Ginn was able to follow the instructions of the jailers. Aplt. App. at 120. When the jailers left Ginn, he was conscious. Aplt. App. at 120.

Approximately three hours after he was placed in a CCDC receiving cell, he was found unconscious and determined to be dead. Aplt. App. at 126-127. The Medical Examiner determined that the cause of death was "[s]udden heart attack due to coronary artery disease." Aplt. App. at 134. At the time of the autopsy, Ginn's blood alcohol level was .32. Aplt. App. at 135.

In order to recover under 42 U.S.C. § 1983 against any of the County Officers, or the County, Martinez was required to show that the officers were deliberately indifferent to Ginn's serious medical needs, and that this was the cause of his death. The District Court correctly held that Martinez failed to do this.

In its Order of January 24, 2008, the District Court granted summary judgment in favor of all Defendants. On April 21, 2009, the Tenth Circuit

upheld the granting of summary judgment in favor of all County Officers, and the County. *Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009).

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEAL WITH REGARD TO THE REQUIREMENT THAT THERE BE AN UNDERLYING CONSTITUTIONAL VIOLATION BEFORE A COUNTY OR MUNICIPALITY CAN BE HELD LIABLE UNDER 42 U.S.C. § 1983.

Petitioner Martinez brought this lawsuit under 42 U.S.C. § 1983 against County Officers DeWayne Beggs, Sheriff of Cleveland County, Kevin Brandon, David Epps, James Bullard, Tommy Edwards, and Gilbert Kirkland, and under the Oklahoma Governmental Tort Claim Act, Okla. Stat. tit. 51, §§ 151-172, against the Board of County Commissioners of Cleveland County ("County") regarding the death of Kenneth Wayne Ginn ("Ginn") in the Cleveland County Detention Center ("CCDC") on May 2, 2006.

In this case, *Martinez v. Beggs*, 563 F.3d 1082, 1091 (10th Cir. 2009), the Tenth Circuit held that the sheriff and county were not liable because there was no showing of any underlying constitutional violation by any of its officers. The court of appeals also held that Sheriff Beggs could not be held liable in his

individual capacity or for implementing county policies or for the actions of county officers under a theory of supervisory liability, when there was no violation of Ginn's constitutional rights. *Id.* at 1092.

With regard to the plaintiff's claim that the county may still be liable for a "systemic injury" caused by the interactive behavior of several government officials, each of whom may be acting in good faith, the court held that even under this theory, a municipality cannot be held liable for constitutional violations where there was no underlying constitutional violation by any of its officers. *Id.* at 1092.

In her Petition at 14, Petitioner claims that courts have split on the question of whether a county (or a municipality) can be held liable for violating a person's constitutional rights when there is no underlying constitutional violation by any of its officers. This is an incorrect statement. The Tenth Circuit's ruling in *Martinez* followed that of the Supreme Court in *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if officer acted constitutionally, city cannot be held liable; a municipality cannot be held liable under § 1983 in the absence of an underlying constitutional violation).

The opinion of the Tenth Circuit in the present case was also consistent with its own precedent, and with all other courts of appeals decisions around the country. *See, e.g.*, *Case v. Eslinger*, 555 F.3d 1317, 1328 (11th Cir. 2009) (holding that the sheriff and the city were also entitled to summary judgment because

§ 1983 does not authorize the award of damages against a municipal corporation based on the actions of one of its officers when in fact the officer inflicted no constitutional harm); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1264 (10th Cir. 2008) (to establish a prima facie case for failure to train or supervise in an excessive force case, a plaintiff must demonstrate the officers in question exceeded the constitutional limitations on the use of force; holding that since no constitutional violation occurred, the estate of a person shot by the police could not proceed on this § 1983 claim); *Long v. City and County of Honolulu*, 511 F.3d 901, 907 (9th Cir. 2007) (a police officer acted reasonably in using deadly force to shoot and kill an armed suspect who had barricaded himself in his residence, because the officer had probable cause to believe that the suspect posed an immediate threat of serious physical harm to him and other officers; therefore, the city could not be held liable under § 1983, holding that if no constitutional violation occurred, the municipality cannot be held liable); *Mecham v. Frazier*, 500 F.3d 1200, 1205 n.5 (10th Cir. 2007) (if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point); *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007) ("there can be no liability under *Monell* for failure to train where when there has been no violation of the plaintiff's constitutional rights."); *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) (holding

that absent an underlying constitutional violation arising from the dismissal of the probationary teacher, there was no basis for a *Monell* liability against the city for an alleged failure to train a municipal investigator who prepared the report in the teacher's case); *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006) (stating that a municipality may not be held liable where there was no underlying constitutional violation by any of its officers); *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1223 (10th Cir. 2006) ("'A municipality may not be held liable for an alleged civil rights violation where there was no underlying constitutional violation by any of its officers.'"); *Cook ex rel. Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1115 (11th Cir. 2005) ("A § 1983 claim is predicated on an alleged violation of an underlying constitutional right."); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1205 n.1 (10th Cir. 2004) (noting that a municipality cannot be held liable for constitutional violations unless its officers committed a constitutional violation); *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004) (noting that a municipality cannot be found liable if there is no finding that the individual officer is liable on the underlying substantive harm); *Adams v. Auburn Hills*, 336 F.3d 515, 520 (6th Cir. 2003) (holding that without an underlying constitutional violation, the question of whether the officer was entitled to qualified immunity is moot); *Cagle v. Sutherland*, 334 F.3d 980, 989 (11th Cir. 2003) (with regard to a jail suicide, because no underlying constitutional violation existed with regard to deliberate

indifference to a known risk of suicide, the sheriff, as the supervisor, was entitled to summary judgment); *Bukowsky v. City of Akron*, 326 F.3d 702, 712-13 (6th Cir. 2003) ("Because the City . . . can only be held liable if there is a showing of liability on the part of its officials, the determination that the City's officials did not violate the plaintiffs' constitutional rights resolves the claim against the City as well."); *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (because the officer did not violate the arrestee's constitutional rights, the city was in the clear as well); *Livsey v. Salt Lake County*, 275 F.3d 952, 958 (10th Cir. 2001) ("A municipality may not be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights."); *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001) (city could not be held liable under § 1983 in the absence of a constitutional violation by police officers; this is true even if city's policies, training, and supervision of other officers were unconstitutional); *Kiser v. City of Huron*, 219 F.3d 814, 816 (8th Cir. 2000) (city could not be held liable under § 1983 for the alleged failure to train police officers adequately when the underlying warrantless arrest was supported by probable cause); *Scott v. Clay County*, 205 F.3d 867, 879 (6th Cir. 2000) (court's ruling that no officer had deprived plaintiff of any constitutional right defeated the claim against county as well).

## II. THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE COUNTY OFFICERS AND THE COUNTY; THERE WAS NO DELIBERATE INDIFFERENCE TO ANY SERIOUS MEDICAL NEED INVOLVING DECEDENT GINN.

In order to recover under 42 U.S.C. § 1983 against any of the County Defendants, Martinez was required to show that the officers were deliberately indifferent to Ginn's serious medical needs, and that this was the cause of his death. The Tenth Circuit correctly upheld the District Court's granting of summary judgment to County Defendants. Because the defendants did not violate Ginn's constitutional rights, the court held that there was no need to address whether those rights were clearly established for qualified immunity purposes. *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009).

In this case, the court of appeals held that arresting officers and custodian officers had no reason to suspect that the detainee, who was intoxicated, posed a risk of heart attack and death, as required to support the § 1983 claim that the officers violated the Fourteenth Amendment by allegedly being deliberately indifferent to the detainee's serious medical needs. *Martinez*, 563 F.3d at 1090-91. The court observed that Ginn was asked by an officer who first arrived at the scene, Kirkland, if he was all right and if he needed any medical assistance. Ginn said he was

all right and did not need medical assistance. *Id.* at 1085. The supervisor who arrived at the scene, Lt. Barbara McSwain, told the officers she knew Ginn personally and that Ginn was an alcoholic. *Id.* at 1085. The officers told Ginn that if he did not leave the third party's property, they would have no choice but to arrest him for public intoxication, but Ginn refused to leave. *Id.* He was arrested for public intoxication.

Ginn was then taken to the Cleveland County Detention Center. Ginn was able to walk into the detention center with assistance from the two receiving detention officers. *Id.* at 1086-87. These two detention officers, Brandon and Epps, took him to a cell and Ginn complied with the request to kneel down so his handcuffs could be removed. Brandon, Epps and Kirkland last saw Ginn alive and resting his arms on the cell bench. *Id.* at 1087. Approximately three hours after Ginn first arrived, Brandon returned to the receiving cell and found Ginn dead, with his body in a kneeling position. *Id.* at 1087. The cause of death was sudden heart attack due to coronary artery disease, and that the death was caused by heart attack rather than acute alcohol intoxication. The medical examiner stated in her report that the acute alcohol intoxication would be a contributing factor to the death. *Id.* at 1087.

In *Martinez*, 563 F.3d at 1089, the Tenth Circuit cited the case of *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) and noted that a prison official cannot be liable under the Eighth Amendment for denying an

inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to the inmate's health or safety. The court in *Martinez* correctly applied *Farmer*, holding that an official alleged to have been deliberately indifferent must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Id.* The court observed that the Supreme Court has cautioned that an obvious risk cannot conclusively establish an inference that the official subjectively knew of the substantial risk of harm, because a prison official may show that the obvious escaped him. *Id.* at 1089.

The court of appeals stated that in a deliberate indifference case involving a suicide, a plaintiff is required to show that defendants were deliberately indifferent to the specific risk of suicide, and not merely to the risk of intoxication. *Id.* at 1089. The court of appeals' opinion was consistent with its previous opinions on a similar issue. *See Estate of Hocker v. Walsh*, 22 F.3d 995, 1000 (10th Cir. 1994) (holding that a jail detainee's intoxication alone is not sufficient to impose § 1983 liability for a subsequent suicide; the court upheld the granting of summary judgment in favor of Cleveland County and its sheriff in a jail suicide case where the jail detention staff did not know and had no reason to know of a specific risk of suicide). It is also consistent with other federal court holdings in this issue. *See Hines v. Henson*, 293 Fed. Appx. 261, 262-63 (5th Cir. 2008) (summary

judgment upheld where officers were unaware that decedent had a stroke prior to his arrest, where § 1983 plaintiff was arrested for public intoxication, transported to jail exhibiting signs of intoxication and suffered a stroke after release); *Hall v. County of Nemaha*, 509 F. Supp. 2d 821, 825, 833 (D. Neb. 2007) (summary judgment denied to jailer who was aware that arrestee had ingested methamphetamine, but summary judgment was upheld with regard to arresting officers who were unaware of ingestion of methamphetamine and arrestee acted like an intoxicated person who appeared to suffer nothing more than a drug induced stupor while in jail); *Patrick v. Lewis*, 397 F. Supp. 2d 1134, 1141-42 (D. Minn. 2005) (overnight jailer was not deliberately indifferent to arrestee's serious medical needs despite knowledge of arrestee's intoxication where he appeared to not have a medical need).

In the present case, the sufficiently serious subjective harm that Ginn faced was heart attack and death, not acute intoxication. *Martinez*, 563 F.3d at 1090. The court of appeals agreed with the district court's determination that there was no evidence in the record of any symptoms or signs that indicated that Ginn would suffer a heart attack. *Id.* The court stated that the officers subjectively knew that Ginn was intoxicated, but there is no evidence to show that anyone would have known that Ginn would face an imminent heart attack or death, much less that the individual county defendants subjectively knew that Ginn was at risk of heart attack or death. *Id.* at 1090.

In *Martinez*, the court of appeals pointed out that Ginn was conscious, on his feet, argumentative and cognizant that he was being arrested. *Id.* at 1091. Ginn was not unconscious and showed no obvious symptoms indicating a risk of serious harm. *Id.* The court held that nothing in the record indicated that Ginn exhibited symptoms that would predict his imminent heart attack or death.

As was noted, to establish deliberate indifference, the record must show that officers knew of and disregarded an excessive risk to Mr. Ginn's health and safety. The record in this case did not show facts that from which an inference could be drawn that a substantial risk of heart attack and death existed and that the defendants actually draw that inference. There was nothing to indicate that Ginn needed medical treatment, and he declined it when it was offered to him. Ginn did not have any medications of any kind on his person, and he did not have any medical ID bracelet or similar item, indicating he had any kind of medical condition, which would have alerted County Officers to the alleged need for medical treatment. Furthermore, there is no case law which, when considered with the facts discussed above, would require County Officers to have taken Ginn to a medical facility, in lieu of incarceration, or to have given Ginn a breathalyzer test to determine his level of intoxication.

When Ginn was arrested, even though he did not appear to be injured in any way, Kirkland offered him medical assistance, but Ginn declined his offer. Aplt.

App. at 92; 101. Ginn told Kirkland he was alright. Aplt. App. at 92. Ginn displayed no external injuries. Aplt. App. at 94. Edwards asked Ginn is he had ingested anything except alcohol, and Ginn told him that he had not. Aplt. App. at 103.

On the way to jail, Epps asked Ginn if he was alright, and Ginn said that he was. Aplt. App. at 119. When they arrived at the jail, Ginn was awake. Upon arriving at the jail, Ginn attempted to kick Brandon as Ginn was getting out of the car. Aplt. App. at 114.

When Ginn was placed in his cell at the CCDC, Ginn was able to follow the instructions of the jailers. When the jailers left Ginn, he was conscious. Aplt. App. at 115; 120. He never requested medical assistance from any jailer. Aplt. App. at 116; 120.

Ginn was conscious at the time of arrest and at the time he was placed in the jail cell. Aplt. App. at 119-120. Ginn made no complaints of pain or distress or of a heart condition, and displayed no sign of heaving ingested drugs. Ginn had no breathing problems, no mental health issues, and had no medical identification or medicine on his person. There were no complaints from Mr. Ginn of any pain or distress. Aplt. App. at 120; 126. Ginn made no request for assistance. Aplt. App. at 94; 96. Ginn had no signs of external injuries. Aplt. App. at 94. The officers did not know what Ginn's blood alcohol level was.

Ginn had no serious health condition of which any officer was aware. Ginn never vomited and never exhibited choking. There were no signs that Ginn

would suffer a heart attack, or that he was in any pain or distress. Ginn never grabbed his heart area, or complained of numbness in his arms. There was no indication that Ginn was mentally ill. There was no mention by Ginn of any previous heart condition. Ginn never said he was sick. Ginn was merely intoxicated. When the officers left the cell, Ginn was conscious. Aplt. App. at 120.

The Tenth Circuit correctly held that to be liable under 42 U.S.C. § 1983, the officers must be aware of the facts from which an inference could be drawn that a substantial risk of serious harm exists, and they must also actually draw the inference. *Martinez*, 563 F.3d at 1089. In this case, there was nothing to show that officers were aware that Ginn faced a substantial risk of a heart attack and required medical attention.

Martinez has also contended that the County Officers should have ascertained Ginn's level of intoxication when he was brought to the CCDC. However, under Oklahoma law, evidence of the alcohol concentration of a person's breath or blood is not required to arrest or charge that person for public intoxication. Okla. Stat. tit. 47, §§ 751-754; *Findlay v. City of Tulsa*, 561 P.2d 980, 984-85 (Okla. Crim. App. 1997) (holding that a defendant arrested for public intoxication was not entitled to a breathalyzer or blood test). Therefore, Ginn was not given a breathalyzer to determine the level of his intoxication since he was arrested for public intoxication. Aplt. App. at 109-110.

The persons present at the scene of the arrest had significant training and experience with regard to handling medical issues. Lt. McSwain had been a hospital Naval corpsman for six years and an EMT in New York state for ten years. Aplt. App. at 107. Kirkland was a twenty-one year Marine Corps veteran. Aplt. App. at 91; 228. Kirkland had been a drug abuse counselor in the Marines for approximately the last 1½ years he was in the Marine Corps. Aplt. App. at 229-230. The Sheriff's office provided CPR and first aid classes to its officers. Aplt. App. at 261.

Furthermore, the persons who came in contact at the jail with Ginn, County Officers Brandon and Epps, were experienced with certifications and extensive training. Aplt. App. at 113; 118. And Brandon had first aid training in the United States military and served two tours of duty and had training as a certified Combat Life Saver. Aplt. App. at 261.

The decision of the Tenth Circuit was correct, and this Court should deny this Petition.

## CONCLUSION

The Petition is unfounded, and there is no sound basis to grant it. County Officers and the County respectfully request that the Petition be denied.

Respectfully submitted,

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Dated: August 24, 2009

39

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No. 09-87

Supreme Court, U.S.
FILED
SEP 8 - 2009
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

GINGER MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn,

*Petitioner,*

v.

DeWAYNE BEGGS, as Sheriff of Cleveland County; DAVID EPPS; KEVIN BRANDON; CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS; TOMMY EDWARDS; GILBERT KIRKLAND,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether the county can be held liable under 42 U.S.C. § 1983 for its own unconstitutional conduct when there has been no underlying violation of the United States Constitution by any officer.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

REPLY BRIEF OF THE PETITIONER ..... 1

THERE IS A CONFLICT AMONG THE COURTS AS TO WHETHER A COUNTY CAN BE LIABLE FOR VIOLATING AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHERE THERE IS NO UNDERLYING CONSTITUTIONAL VIOLATION BY ANY OF ITS OFFICERS ..... 1

CONCLUSION ..... 5

# TABLE OF AUTHORITIES

Page

CASES

*Brown v. Commonwealth of Pennsylvania, Dept. of Health Emergency Medical Services Training Institute*, 318 F.3d 473 (3d Cir. 2003) ..... 2

*City of Los Angeles v. Heller*, 475 U.S. 796 (1986) ..... 4, 5

*Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996) ..... 2

*Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) ..... 2, 3

*Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002) ..... 3, 4

*Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) ..... 4

*Mark v. Borough of Hatboro*, 51 F.3d 1137 (3d Cir. 1995) ..... 3

*Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) ..... 3, 5

*Owen v. City of Independence*, 445 U.S. 622 (1980) ..... 1

*Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992) ..... 3, 4

*Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986) ..... 4, 5

*Seymour v. City of Des Moines*, 519 F.3d 790 (8th Cir. 2008) ..... 3

*Speer v. City of Wynne*, 276 F.3d 980 (8th Cir. 2002) ..... 3, 4

TABLE OF AUTHORITIES – Continued

Page

*Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994) .....2

*Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001) .....2

*Young v. City of Mount Rainier*, 238 F.3d 567 (4th Cir. 2001) .....2

STATUTES

42 U.S.C. § 1983 .....*passim*

## REPLY BRIEF FOR PETITIONER

### THERE IS A CONFLICT AMONG THE COURTS AS TO WHETHER A COUNTY CAN BE LIABLE FOR VIOLATING AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHERE THERE IS NO UNDERLYING CONSTITUTIONAL VIOLATION BY ANY OF ITS OFFICERS

The respondents' brief in opposition underscores the need for review by this Court. One of the primary assertions of respondents' brief is that "there is no conflict" among the courts of appeals with regard to the requirement that there be an underlying constitutional violation before a county or municipality can be held liable under 42 U.S.C. § 1983. Br. in Opp. 3.

The petitioner certainly agrees that there must be a constitutional violation of the detainee's rights before the county can be held liable. However, the petitioner asserts that there should not be a requirement that an individual officer commit an underlying constitutional violation in order to hold the county liable. The county should be held liable for its own conduct without regard to whether an individual employee's conduct was unconstitutional. The county's liability should not depend upon the liability of any deputy or officer of the county. This Court has previously held that a municipality may be liable even if liability cannot be ascribed to a single individual officer. *Owen v. City of Independence,* 445 U.S. 622, 652 (1980) (a "systemic injury" may "result not so much from the conduct of any single individual, but from the interactive behavior of several

government officials, each of whom may be acting in good faith.").

The petitioner is attempting to draw a distinction between the independent liability of the county for the constitutional violation of an individual's rights as opposed to liability because a deputy or officer violated the constitutional rights of an individual.

The respondents specifically state that the opinion of the Tenth Circuit is consistent with all other courts of appeals decisions around the country. Br. in Opp. 4. To the contrary, the courts are not entirely consistent. In fact, the Third Circuit Court of Appeals clearly states that "[i]t is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable. *Fagan v. City of Vineland,* 22 F.3d 1283, 1292 (3d Cir. 1994) (*Fagan I*)." *Brown v. Commonwealth of Pennsylvania, Dept. of Health Emergency Medical Services Training Institute*, 318 F.3d 473, 482 (3d Cir. 2003). The court further commented on the split of authority at note 3:

> We note that there is a split among the courts of appeals on this issue. Some courts have explicitly rejected our holding in *Fagan I*. *See Trigalet v. City of Tulsa*, 239 F.3d 1150, 1154-55 (10th Cir. 2001), *cert. denied,* 534 U.S. 814, 122 S.Ct. 40, 151 L.Ed.2d 13 (2001); *Young v. City of Mount Rainier*, 238 F.3d 567, 579 n. 9 (4th Cir. 2001); *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996); *Thompson v. Boggs,* 33 F.3d 847, 859 n. 11

(7th Cir. 1994). One panel of this court has even questioned the panel opinion in *Fagan I. See Mark v. Borough of Hatboro,* 51 F.3d 1137, 1153 n. 13 (3d Cir. 1995). But other courts have agreed with our opinion in *Fagan I. See Fairley v. Luman,* 281 F.3d 913 (9th Cir. 2002), *petition for cert. filed,* 537 U.S. 1044, 123 S.Ct. 659, 154 L.Ed.2d 515 (2002) (No. 01-1882).

To establish municipal liability under § 1983, a Plaintiff must show that a constitutional violation was committed pursuant to an official custom, policy, or practice of the governmental entity. *Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 690-92 (1978). There are two basic circumstances under which municipal liability will attach: (1) where a particular municipal policy or custom itself violates federal law, or directs an employee to do so; and (2) where a facially lawful municipal policy or custom was adopted with "deliberate indifference" to its known or obvious consequences. *Seymour v. City of Des Moines*, 519 F.3d 790, 800 (8th Cir. 2008). There need not be a finding that a municipal employee is liable in his or her individual capacity before municipal liability can attach. *Speer v. City of Wynne*, 276 F.3d 980 (8th Cir. 2002); *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be held liable under § 1983 even though no government individuals were personally liable.").

In *Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002), the court explicitly rejected a municipality's

argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. "If a Plaintiff established he suffered constitutional injury *by the City*, the fact that individual officers are exonerated is immaterial to liability under § 1983." *Id.* (Emphasis in original); *see also Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992).

The respondents, at Br. in Opp. 4, rely on *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if officer acted constitutionally, city cannot be held liable; a municipality cannot be held liable under § 1983 in the absence of an underlying constitutional violation.). In *Speer* at 985-986, the court offered this analysis of *Heller*:

> Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. *See Praprotnik v. City of St. Louis,* 798 F.2d 1168, 1172-73 n. 3 (8th Cir. 1986), *rev'd on other grounds,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *see also Parrish v. Luckie,* 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."). As our court noted in *Praprotnik,* a crucial fact underlying the Supreme Court's decision in *Heller* was that the theory of municipal liability asserted was entirely dependent on

> the municipal defendants' responsibility for the officer's alleged unconstitutional acts. *See Praprotnik,* 798 F.2d at 1173 n. 3. A favorable verdict for the individual officer, therefore, would have been entirely inconsistent with a finding that the municipal defendants were responsible for the unconstitutional behavior. [Footnote omitted] *Heller* should not be read to require a plaintiff to show more than that a governmental policy or custom was the "moving force" that led to the deprivation of his constitutional rights, the foundation for municipal liability recognized by the Court in *Monell v. N.Y. Dep't of Soc. Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). [Footnote omitted].

## CONCLUSION

If an individual's constitutional rights are violated by the county's deliberate indifference to the dangers of alcohol intoxication and the county implements inadequate policies and fails to properly train its deputies, and thereby causes injury to the detainee, the county should be held liable. There is no reason to require that an individual officer commit a constitutional violation before a county can be held liable. This is an opportunity for the Court to bring clarity to this constitutional issue and obtain uniformity in the decisions of the lower courts.

The petition for a writ of certiorari is well-founded and should be granted.

Respectfully submitted,

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